COMMENTARIES

ON THE

LAWS

OF

ENGLAND.

BOOK THE SECOND.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER THE FIRST.

OF PROPERTY, IN GENERAL.

THE former book of theſe commentaries having treated at large of the *jura perſonarum*, or ſuch rights and duties as are annexed to the perſons of men, the objects of our enquiry in this ſecond book will be the *jura rerum*, or, thoſe rights which a man may acquire in and to ſuch external things as are unconnected with his perſon. Theſe are what the writers on natural law ſtile the right of dominion, or property, concerning the nature and original of which I ſhall firſt premiſe a few obſervations, before I proceed to diſtribute and conſider its ſeveral objects.

THERE is nothing which ſo generally ſtrikes the imagination, and engages the affections of mankind, as the right of property; or that ſole and deſpotic dominion which one man claims and exerciſes over the external things of the world, in total excluſion of the right of any other individual in the univerſe. And yet there are very few that will give themſelves the trouble to conſider the original and foundation of this right. Pleaſed as we are with the poſſeſſion, we ſeem afraid to look back to the means by which it was acquired, as if fearful of ſome defect in our title; or at beſt we reſt ſatisfied with the deciſion of the laws in our favour, without examining the reaſon or authority upon which thoſe laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by deſcent from our anceſtors, or by the laſt will and teſtament of the dying owner; not caring to reflect that (accurately and ſtrictly ſpeaking) there is no foundation in nature or in natural law, why a ſet of words upon parchment ſhould convey the dominion of land; why the ſon ſhould have a right to exclude his fellow creatures from a determinate ſpot of ground, becauſe his father had done ſo before him; or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain poſſeſſion, ſhould be entitled to tell the reſt of the world which of them ſhould enjoy it after him. Theſe enquiries, it muſt be owned, would be uſeleſs and even troubleſome in common life. It is well if the maſs of mankind will obey the laws when made, without ſcrutinizing too nicely into the reaſons of making them. But, when law is to be conſidered not only as matter of practice, but alſo as a rational ſcience, it cannot be improper or uſeleſs to examine more deeply the rudiments and grounds of theſe poſitive conſtitutions of ſociety.

IN the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man "dominion over "all the earth; and over the fiſh of the ſea, and over the "fowl of the air, and over every living thing that moveth "upon



"upon the earth (a)." This is the only true and ſolid foundation of man's dominoin over external things, whatever airy metaphyſical notions may have been ſtarted by fanciful writers upon this ſubject. The earth therefore, and all things therein, are the general property of all mankind, excluſive of other beings, from the immediate gift of the creator. And, while the earth continued bare of inhabitants, it is reaſonable to ſuppoſe, that all was in common among them, and that every one took from the public ſtock to his own uſe ſuch things as his immediate neceſſities required.

THESE general notions of property were then ſufficient to anſwer all the purpoſes of human life; and might perhaps ſtill have anſwered them, had it been poſſible for mankind to have remained in a ſtate of primaeval ſimplicity: as may be collected from the manners of many American nations when firſt diſcovered by the Europeans; and from the antient method of living among the firſt Europeans themſelves, if we may credit either the memorials of them preſerved in the golden age of the poets, or the uniform accounts given by hiſtorians of thoſe times, wherein "*erant omnia communia* "*et indiviſa omnibus, veluti unum cunctis patrimonium* "*eſſet* (b)." Not that this communion of goods ſeems ever to have been applicable, even in the earlieſt ages, to aught but the *ſubſtance* of the thing; nor could be extended to the *uſe* of it. For, by the law of nature and reaſon, he who firſt began to uſe it, acquired therein a kind of tranſient property, that laſted ſo long as he was uſing it, and no longer (c): or, to ſpeak with greater preciſion, the *right* of poſſeſſion continued for the ſame time only that the *act* of poſſeſſion laſted. Thus the ground was in common, and no part of it was the permanent property of any man in particular: yet whoever was in the occupation of any determinate ſpot of it, for reſt, for ſhade, or the like, acquired for the time a ſort of ownerſhip, from which it would have been unjuſt, and contrary to the law of nature, to have driven him by force; but the inſtant that he quitted the uſe or occupation of

(a) Gen. i. 28. (b) Juſtin. *l.* 43. *c.* 1. (c) Barbeyr. Puff. l. 4. c. 4.

it, another might ſeiſe it without injuſtice. Thus alſo a vine or other tree might be ſaid to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the ſole property of the fruit, which he had gathered for his own repaſt. A doctrine well illuſtrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own (d).

But when mankind increaſed in number, craft, and ambition, it became neceſſary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *uſe* only, but the very *ſubſtance* of the thing to be uſed. Otherwiſe innumerable tumults muſt have ariſen, and the good order of the world been continually broken and diſturbed, while a variety of perſons were ſtriving who ſhould get the firſt occupation of the ſame thing, or diſputing which of them had actually gained it. As human life alſo grew more and more refined, abundance of conveniences were deviſed to render it more eaſy, commodious, and agreeable; as, habitations for ſhelter and ſafety, and raiment for warmth and decency. But no man would be at the trouble to provide either, ſo long as he had only an uſufructuary property in them, which was to ceaſe the inſtant that he quitted poſſeſſion;——if, as ſoon as he walked out of his tent, or pulled off his garment, the next ſtranger who came by would have a right to inhabit the one, and to wear the other. In the caſe of habitations in particular, it was natural to obſerve, that even the brute creation, to whom every thing elſe was in common, maintained a kind of permanent property in their dwellings, eſpecially for the protection of their young; that the birds of the air had neſts, and the beaſts of the fields had caverns, the invaſion of which they eſteemed a very flagrant injuſtice, and would ſacrifice their lives to preſerve them. Hence a property was ſoon eſtabliſhed in every man's houſe and home-ſtall; which ſeem to have been originally mere temporary huts or moveable cabins,

(d) *Quemadmodum theatrum, cum commune ſit, recte tamen dici poteſt, ejus eſſe eum locum quem quiſque occuparit. De Fin. l. 3. c. 20.*

ſuited

ſuited to the deſign of Providence for more ſpeedily peopling the earth, and ſuited to the wandering life of their owners, before any extenſive property in the ſoil or ground was eſtabliſhed. And there can be no doubt, but that moveables of every kind became ſooner appropriated than the permanent ſubſtantial ſoil: partly becauſe they were more ſuſceptible of a long occupancy, which might be continued for months together without any ſenſible interruption, and at length by uſage ripen into an eſtabliſhed right; but principally becauſe few of them could be fit for uſe, till improved and meliorated by the bodily labour of the occupant: which bodily labour, beſtowed upon any ſubject which before lay in common to all men, is univerſally allowed to give the faireſt and moſt reaſonable title to an excluſive property therein.

THE article of food was a more immediate call, and therefore a more early conſideration. Such, as were not contented with the ſpontaneous product of the earth, ſought for a more ſolid refreſhment in the fleſh of beaſts, which they obtained by hunting. But the frequent diſappointments, incident to that method of proviſion, induced them to gather together ſuch animals as were of a more tame and ſequacious nature; and to eſtabliſh a permanent property in their flocks and herds, in order to ſuſtain themſelves in a leſs precarious manner, partly by the milk of the dams, and partly by the fleſh of the young. The ſupport of theſe their cattle made the article of *water* alſo a very important point. And therefore the book of Geneſis (the moſt venerable monument of antiquity, conſidered merely with a view to hiſtory) will furniſh us with frequent inſtances of violent contentions concerning wells; the excluſive property of which appears to have been eſtabliſhed in the firſt digger or occupant, even in ſuch places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a ſojourner, aſſerting his right to a well in the country of Abimelech, and exacting an oath for his ſecurity, "becauſe he had digged that well (e)." And Iſaac, about ninety years afterwards, re-claimed this

(e) Gen. 21. 30.

his father's property; and, after much contention with the Philiſtines, was ſuffered to enjoy it in peace (f).

All this while the ſoil and paſture of the earth remained ſtill in common as before, and open to every occupant: except perhaps in the neighbourhood of towns, where the neceſſity of a ſole and excluſive property in lands (for the ſake of agriculture) was earlier felt, and therefore more readily complied with. Otherwiſe, when the multitude of men and cattle had conſumed every convenience on one ſpot of ground, it was deemed a natural right to ſeize upon and occupy ſuch lands as would more eaſily ſupply their neceſſities. This practice is ſtill retained among the wild and uncultivated nations that have never been formed into civil ſtates, like the Tartars and others in the eaſt; where the climate itſelf, and the boundleſs extent of their territory, conſpire to retain them ſtill in the ſame ſavage ſtate of vagrant liberty, which was univerſal in the earlieſt ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire (g). We have alſo a ſtriking example of the ſame kind in the hiſtory of Abraham and his nephew Lot (h). When their joint ſubſtance became ſo great, that paſture and other conveniences grew ſcarce, the natural conſequence was, that a ſtrife aroſe between their ſervants; ſo that it was no longer practicable to dwell together. This contention Abraham thus endeavoured to compoſe: "let there be no ſtrife, I pray thee, be-"tween thee and me. Is not the whole land before thee? "Separate thyſelf, I pray thee, from me. If thou wilt "take the left hand, then will I go to the right; or if thou "depart to the right hand, then will I go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleaſed, that was not pre-occupied by other tribes. "And Lot lifted up his eyes, and "beheld all the plain of Jordan, that it was well watered "every way, even as the garden of the Lord. Then Lot "choſe him all the plain of Jordan, and journeyed eaſt; "and Abraham dwelt in the land of Canaan."

(f) Gen. 26. 15. 18, &c.
(g) *Colunt diſcreti et diverſi; ut fons, ut campus, ut nemus placuit, De mor. Germ.* 16.
(h) Gen. c. 13.

Upon

UPON the ſame principle was founded the right of migration, or ſending colonies to find out new habitations, when the mother country was overcharged with inhabitants; which was practiſed as well by the Phaenicians and Greeks, as the Germans, Scythians, and other northern people. And, ſo long as it was confined to the ſtocking and cultivation of deſart uninhabited countries, it kept ſtrictly within the limits of the law of nature. But how far the ſeiſing on countries already peopled, and driving out or maſſacring the innocent and defenceleſs natives, merely becauſe they differed from their invaders in language, in religion, in cuſtoms, in government, or in colour; how far ſuch a conduct was conſonant to nature, to reaſon, or to chriſtianity, deſerved well to be conſidered by thoſe, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new ſpots to inhabit, without encroaching upon former occupants; and, by conſtantly occupying the ſame individual ſpot, the fruits of the earth were conſumed, and its ſpontaneous produce deſtroyed, without any proviſion for a future ſupply or ſucceſſion. It therefore became neceſſary to purſue ſome regular method of providing a conſtant ſubſiſtence; and this neceſſity produced, or at leaſt promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connexion and conſequence, introduced and eſtabliſhed the idea of a more permanent property in the ſoil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in ſufficient quantities, without the aſſiſtance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to ſeiſe upon and enjoy the product of his induſtry, art, and labour? Had not therefore a ſeparate property in lands, as well as moveables, been veſted in ſome individuals, the world muſt have continued a foreſt, and men have been mere animals of prey; which, according to ſome philoſophers, is the genuine ſtate of nature. Whereas now (ſo graciouſly

has Providence interwoven our duty and our happineſs together) the reſult of this very neceſſity has been the ennobling of the human ſpecies, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Neceſſity begat property; and, in order to enſure that property, recourſe was had to civil ſociety, which brought along with it a long train of inſeparable concomitants; ſtates, government, laws, puniſhments and the public exerciſe of religious duties. Thus connected together, it was found that a part only of ſociety was ſufficient to provide, by their manual labour, for the neceſſary ſubſiſtence of all; and leiſure was given to others to cultivate the human mind, to invent uſeful arts, and to lay the foundations of ſcience.

The only queſtion remaining is, how this property became actually veſted; or what it is that gave a man an excluſive right to retain in a permanent manner that ſpecific land, which before belonged generally to every body, but particularly to nobody. And, as we before obſerved that occupancy gave the right to the temporary *uſe* of the ſoil, ſo it is agreed upon all hands that occupancy gave alſo the original right to the permanent property in the *ſubſtance* of the earth itſelf; which excludes every one elſe but the owner from the uſe of it. There is indeed ſome difference among the writers on natural law, concerning the reaſon why occupancy ſhould convey this right, and inveſt one with this abſolute property: Grotius and Puffendorf inſiſting, that this right of occupancy is founded upon a tacit and implied aſſent of all mankind, that the firſt occupant ſhould become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no ſuch implied aſſent, neither is it neceſſary that there ſhould be; for that the very act of occupancy, alone, being a degree of bodily labour, is from a principle of natural juſtice, without any conſent or compact, ſufficient of itſelf to gain a title. A diſpute that ſavours too much of nice and ſcholaſtic refinement! However, both ſides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man ſeiſing to his own continued uſe ſuch ſpots of ground as he found moſt agreeable

able to his own convenience, provided he found them unoccupied by any one elſe.

PROPERTY, both in lands and moveables, being thus originally acquired by the firſt taker, which taking amounts to a declaration that he intends to appropriate the thing to his own uſe, it remains in him, by the principles of univerſal law, till ſuch time as he does ſome other act which ſhews an intention to abandon it: for then it becomes, naturally ſpeaking, *publici juris* once more, and is liable again to be appropriated by the next occupant. So if one is poſſeſſed of a jewel, and caſts it into the ſea or a public highway, this is ſuch an expreſs dereliction, that a property will be veſted in the firſt fortunate finder that will ſeiſe it to his own uſe. But if he hides it privately in the earth, or other ſecret place, and it is diſcovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary: and if he loſes or drops it by accident, it cannot be collected from thence, that he deſigned to quit the poſſeſſion; and therefore in ſuch caſe the property ſtill remains in the loſer, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treaſure trove (i).

BUT this method, of one man's abandoning his property, and another's ſeiſing the vacant poſſeſſion, however well founded in theory, could not long ſubſiſt in fact. It was calculated merely for the rudiments of civil ſociety, and neceſſarily ceaſed among the complicated intereſts and artificial refinements of polite and eſtabliſhed governments. In theſe it was found, that what became inconvenient or uſeleſs to one man was highly convenient and uſeful to another; who was ready to give in exchange for it ſome equivalent, that was equally deſirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by ſale, grant, or conveyance: which may be conſidered either as a continuance

(i) See book I. pag. 285.

of

of the original poſſeſſion which the firſt occupant had; or as an abandoning of the thing by the preſent owner, and an immediate ſucceſſive occupancy of the ſame by the new proprietor. The voluntary dereliction of the owner, and delivering the poſſeſſion to another individual, amount to a transfer of the property; the proprietor declaring his intention no longer to occupy the thing himſelf, but that his own right of occupancy ſhall be veſted in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my having abandoned the property, and Titius, being the only or firſt man acquainted with ſuch my intention, immediately ſteps in and ſeiſes the vacant poſſeſſion: thus the conſent expreſſed by the conveyance gives Titius a good right againſt me; and poſſeſſion, or occupancy, confirms that right againſt all the world beſides.

THE moſt univerſal and effectual way, of abandoning property, is by the death of the occupant: when, both the actual poſſeſſion and intention of keeping poſſeſſion ceaſing, the property, which is founded upon ſuch poſſeſſion and intention, ought alſo to ceaſe of courſe. For, naturally ſpeaking, the inſtant a man ceaſes to be, he ceaſes to have any dominion; elſe, if he had a right to diſpoſe of his acquiſitions one moment beyond his life, he would alſo have a right to direct their diſpoſal for a million of ages after him; which would be highly abſurd and inconvenient. All property muſt therefore ceaſe upon death, conſidering men as abſolute individuals, and unconnected with civil ſociety: for then, by the principles before eſtabliſhed, the next immediate occupant would acquire a right in all that the deceaſed poſſeſſed. But as, under civilized governments which are calculated for the peace of mankind, ſuch a conſtitution would be productive of endleſs diſturbances, the univerſal law of almoſt every nation (which is a kind of ſecondary law of nature) has either given the dying perſon a power of continuing his property, by diſpoſing of his poſſeſſions by will; or, in caſe he neglects to diſpoſe of it, or is not permitted to make any diſpoſition at all, the

the municipal law of the country then ſteps in, and declares who ſhall be the ſucceſſor, repreſentative, or heir of the deceaſed; that is, who alone ſhall have a right to enter upon this vacant poſſeſſion, in order to avoid that confuſion, which its becoming again common would occaſion (j). And farther, in caſe no teſtament be permitted by the law, or none be made, and no heir can be found ſo qualified as the law requires, ſtill, to prevent the robuſt title of occupancy from again taking place, the doctrine of eſcheats is adopted in almoſt every country; whereby the ſovereign of the ſtate, and thoſe who claim under his authority, are the ultimate heirs, and ſucceed to thoſe inheritances, to which no other title can be formed.

THE right of inheritance, or deſcent to the children and relations of the deceaſed, ſeems to have been allowed much earlier than the right of deviſing by teſtament. We are apt to conceive at firſt view that it has nature on its ſide; yet we often miſtake for nature what we find eſtabliſhed by long and inveterate cuſtom. It is certainly a wiſe and effectual, but clearly a political, eſtabliſhment; ſince the permanent right of property, veſted in the anceſtor himſelf, was no *natural*, but merely a *civil*, right. It is true, that the tranſmiſſion of one's poſſeſſions to poſterity has an evident tendency to make a man a good citizen and a uſeful member of ſociety: it ſets the paſſions on the ſide of duty, and prompts a man to deſerve well of the public, when he is ſure that the reward of his ſervices will not die with himſelf, but be tranſmitted to thoſe with whom he is connected by the deareſt and moſt tender affections. Yet, reaſonable as this foundation of the right of inheritance may ſeem, it is probable that its immediate original aroſe not from ſpeculations altogether ſo delicate and refined; and, if not from fortuitous circumſtances, at leaſt from a plainer and more ſimple principle. A man's children or neareſt relations are uſually about him on his death-bed, and are the

(j) It is principally to prevent any vacancy of poſſeſſion, that the civil law conſiders father and ſon as one perſon; ſo that upon the death of either, the inheritance does not ſo properly deſcend, as continue in the hands of the ſurvivor. *Ff.* 28. 2. 11.

earlieſt

earlieſt witneſſes of his deceaſe. They became therefore generally the next immediate occupants, till at length in proceſs of time this frequent uſage ripened into general law. And therefore alſo in the earlieſt ages, on failure of children, a man's ſervants born under his roof were allowed to be his heirs; being immediately on the ſpot when he died. For we find the old patriarch Abraham expreſsly declaring, that "ſince God had given him no ſeed, his ſteward Eliezer, "one born in his houſe, was his heir (k)."

WHILE property continued only for life, teſtaments were uſeleſs and unknown; and, when it became inheritable, the inheritance was long indefeaſible, and the children or heirs at law were incapable of excluſion by will. Till at length it was found, that ſo ſtrict a rule of inheritance made heirs diſobedient and headſtrong, defrauded creditors of their juſt debts, and prevented many provident fathers from dividing or charging their eſtates as the exigence of their families required. This introduced pretty generally the right of diſpoſing one's property, or a part of it, by *teſtament*; that is, by written or oral inſtructions properly *witneſſed* and authenticated, according to the *pleaſure* of the deceaſed; which we therefore emphatically ſtile his *will*. This was eſtabliſhed in ſome countries much later than in others. With us in England, till modern times, a man could only diſpoſe of one third of his moveables from his wife and children: and, in general, no will was permitted of lands till the reign of Henry the eighth; and then only of a certain portion: for it was not till after the reſtoration that the power of deviſing real property became ſo univerſal as at preſent.

WILLS therefore and teſtaments, rights of inheritance and ſucceſſions, are all of them creatures of the civil or municipal laws, and accordingly are in all reſpects regulated by them; every diſtinct country having different ceremonies and requiſites to make a teſtament completely valid: neither does any thing vary more than the right of inheritance under different national eſtabliſh-

(k) Gen. 15. 3.

ments.

ments. In England particularly this diverſity is carried to ſuch a length, as if it had been meant to point out the power of the laws in regulating the ſucceſſion to property, and how futile every claim muſt be that has not its foundation in the poſitive rules of the ſtate. In perſonal eſtates the father may ſucceed to his children; in landed property he never can be their immediate heir, by any the remoteſt poſſibility: in general only the eldeſt ſon, in ſome places only the youngeſt, in others all the ſons together, have a right to ſucceed to the inheritance: in real eſtates males are preferred to females, and the eldeſt male will uſually exclude the reſt; in the diviſion of perſonal eſtates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

THIS one conſideration may help to remove the ſcruples of many well-meaning perſons, who ſet up a miſtaken conſcience in oppoſition to the rules of law. If a man diſinherits his ſon, by a will duly executed, and leaves his eſtate to a ſtranger, there are many who conſider this proceeding as contrary to natural juſtice: while others ſo ſcrupulouſly adhere to the ſuppoſed intention of the dead, that if a will of lands be atteſted only by *two* witneſſes inſtead of *three*, which the law requires, they are apt to imagine that the heir is bound in conſcience to relinquiſh his title to the deviſee. But both of them certainly proceed upon very erroneous principles: as if, on the one hand, the ſon had by nature a right to ſucceed to his father's lands; or as if, on the other hand, the owner was by nature intitled to direct the ſucceſſion of his property after his own deceaſe. Whereas the law of nature ſuggeſts, that on the death of the poſſeſſor the eſtate ſhould again become common, and be open to the next occupant, unleſs otherwiſe ordered for the ſake of civil peace by the poſitive law of ſociety. The poſitive law of ſociety, which is with us the municipal law of England, directs it to veſt in ſuch perſon as the laſt proprietor ſhall by will, attended with certain requiſites, appoint; and, in defect of ſuch appointment, to go to ſome particular perſon, who, from the reſult of certain local conſti-

conſtitutions, appears to be heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a ſhadow of right in any one but the perſon appointed: and, where the neceſſary requiſites are omitted, the right of the heir is equally ſtrong and built upon as ſolid a foundation, as the right of the deviſee would have been, ſuppoſing ſuch requiſites were obſerved.

BUT, after all, there are ſome few things, which notwithſtanding the general introduction and continuance of property, muſt ſtill unavoidably remain in common; being ſuch wherein nothing but an uſufructuary property is capable of being had; and therefore they ſtill belong to the firſt occupant, during the time he holds poſſeſſion of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: ſuch alſo are the generality of thoſe animals which are ſaid to be *ferae naturae*, or of a wild and untameable diſpoſition; which any man may ſeiſe upon and keep for his own uſe or pleaſure. All theſe things, ſo long as they remain in poſſeſſion, every man has a right to enjoy without diſturbance; but if once they eſcape from his cuſtody, or he voluntarily abandons the uſe of them, they return to the common ſtock, and any man elſe has an equal right to ſeiſe and enjoy them afterwards.

AGAIN; there are other things, in which a permanent property *may* ſubſiſt, not only as to the temporary uſe, but alſo the ſolid ſubſiſtance; and which yet would be frequently found without a proprietor, had not the wiſdom of the law provided a remedy to obviate this inconvenience. Such are foreſts and other waſte grounds, which were omitted to be appropriated in the general diſtribution of lands: ſuch alſo are wrecks, eſtrays, and that ſpecies of wild animals, which the arbitrary conſtitutions of poſitive law have diſtinguiſhed from the reſt by the well-known appellation of game. With regard to theſe and ſome others, as diſtur-

diſturbances and quarrels would frequently ariſe among individuals, contending about the acquiſition of this ſpecies of property by firſt occupancy, the law has therefore wiſely cut up the root of diſſenſion, by veſting the things themſelves in the ſovereign of the ſtate; or elſe in his repreſentatives, appointed and authorized by him, being uſually the lords of manors. And thus the legiſlature of England has univerſally promoted the grand ends of civil ſociety, the peace and ſecurity of individuals, by ſteadily purſuing that wiſe and orderly maxim, of aſſigning to every thing capable of ownerſhip a legal and determinate owner.

CHAPTER

CHAPTER THE SECOND.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

THE objects of dominion or property are *things*, as contradiſtinguiſhed from *perſons*: and things are by the law of England diſtributed into two kinds; things *real*, and things *perſonal*. Things real are ſuch as are permanent, fixed, and immoveable, which cannot be carried out of their place; as lands and tenements: things perſonal are goods, money, and all other moveables; which may attend the owner's perſon wherever he thinks proper to go.

IN treating of things real, let us conſider, firſt, their ſeveral ſorts or kinds; ſecondly, the tenures by which they may be holden; thirdly, the eſtates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and loſing it.

FIRST, with regard to their ſeveral ſorts or kinds, things real are uſually ſaid to conſiſt in lands, tenements, or hereditaments. *Land* comprehends all things of a permanent, ſubſtantial nature; being a word of a very extenſive ſignification, as will preſently appear more at large. *Tenement* is a word of ſtill greater extent; and though in its vulgar acceptation it is only applied to houſes

houſes and other buildings, yet in its original, proper, and legal ſenſe it ſignifies every thing that may be *holden*, provided it be of a permanent nature; whether it be of a ſubſtantial and ſenſible, or of an unſubſtantial ideal kind. Thus *liberum tenementum*, franktenement, or freehold, is applicable not only to lands and other ſolid objects, but alſo to offices, rents, commons, and the like (a): and as lands and houſes are tenements, ſo is an advowſon a tenement; and a franchiſe, an office, a right of common, a peerage, or other property of the like unſubſtantial kind, are, all of them, legally ſpeaking, tenements (b). But an *hereditament*, ſays ſir Edward Coke (c), is by much the largeſt and moſt comprehenſive expreſſion; for it includes not only lands and tenements, but whatſoever may be *inherited*, be it corporeal, or incorporeal, real, perſonal, or mixed. Thus an heir loom, or implement of furniture which by cuſtom deſcends to the heir together with an houſe, is neither land, nor tenement, but a mere moveable; yet, being inheritable, it is comprized under the general word, hereditament: and ſo a condition, the benefit of which may deſcend to a man from his anceſtor, is alſo an hereditament (d).

HEREDITAMENTS then, to uſe the largeſt expreſſion, are of two kinds, corporeal, and incorporeal. Corporeal conſiſt of ſuch as affect the ſenſes; ſuch as may be ſeen and handled by the body: incorporeal are not the object of ſenſation, can neither be ſeen nor handled, are creatures of the mind, and exiſt only in contemplation.

CORPOREAL hereditaments conſiſt wholly of ſubſtantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, ſays ſir Edward Coke (e), comprehendeth in its legal ſignification any ground, ſoil, or earth whatſoever; as arable, meadows, paſtures, woods, moors, waters, mariſhes, furzes, and heath. It

(a) Co. Lit. 6.
(b) *Ibid.* 19, 20.
(c) 1 Inſt. 6.
(d) 3 Rep. 2.
(e) 1 Inſt. 4.

legally includeth alſo all caſtles, houſes, and other buildings: for they conſiſt, ſaith he, of two things; *land*, which is the foundation; and *ſtructure* thereupon: ſo that, if I convey the land or ground, the ſtructure or building paſſeth therewith. It is obſervable that *water* is here mentioned as a ſpecies of land, which may ſeem a kind of ſoleciſm; but ſuch is the language of the law: and I cannot bring an action to recover poſſeſſion of a pool or other piece of water, by the name of *water* only; either by calculating its capacity, as, for ſo many cubical yards; or, by ſuperficial meaſure, for twenty acres of water; or by a general deſcription, as for a pond, a watercourſe, or a rivulet: but I muſt bring my action for the land that lies at the bottom, and muſt call it twenty acres of *land covered with water* (f). For water is a moveable, wandering thing, and muſt of neceſſity continue common by the law of nature; ſo that I can only have a temporary, tranſient, uſufructuary property therein: wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immoveable: and therefore in this I may have a certain, ſubſtantial property; of which the law will take notice, and not of the other.

Land hath alſo, in its legal ſignification, an indefinite extent, upwards as well as downwards. *Cujus eſt ſolum, ejus eſt uſque ad coelum*, is the maxim of the law, upwards; therefore no man may erect any building, of the like, to overhang another's land: and, downwards, whatever is in a direct line between the ſurface of any land, and the center of the earth, belongs to the owner of the ſurface; as is every day's experience in the mining countries So that the word "land" includes not only the face of the earth, but every thing under it, or over it. And therefore if a man grants all his lands, he grants thereby all his mines of metal and other foſſils, his woods, his waters, and his houſes, as well as his fields and meadows. Not but the particular names of the things are equally ſufficient to paſs them, except in the in-

(f) Brownl. 142.

ſtance

ſtance of water; by a grant of which, nothing paſſes but a right of fiſhing (g): but the capital diſtinction is this; that by the name of a caſtle, meſſuage, toft, croft, or the like, nothing elſe will paſs, except what falls with the utmoſt propriety under the term made uſe of; but by the name of land, which is *nomen generaliſſimum*, every thing terreſtrial will paſs (h).

(g) Co. Litt. 4.

(h) Co. Litt. 4, 5, 6.

CHAPTER THE THIRD.

OF INCORPOREAL HEREDITAMENTS.

AN incorporeal hereditament is a right iſſuing out of a thing corporate (whether real or perſonal) or concerning, or annexed to, or exerciſible within, the ſame (a). It is not the thing corporate itſelf, which may conſiſt in lands, houſes, jewels, or the like; but ſomething collateral thereto, as a rent iſſuing out of thoſe lands or houſes, or an office relating to thoſe jewels. In ſhort, as the logicians ſpeak, corporeal hereditaments are the ſubſtance, which may always be ſeen, always handled: incorporeal hereditaments are but a ſort of accidents, which inhere in and are ſupported by that ſubſtance; and may belong, or not belong to it, without any viſible alteration therein. Their exiſtence is merely in idea and abſtracted contemplation; though their effects and profits may be frequently objects of our bodily ſenſes. And indeed, if we could fix a clear notion of an incorporeal hereditament, we muſt be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for inſtance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtleſs of a corporeal nature, yet the annuity itſelf, which produces that money, is a thing inviſible, has only a mental exiſtence, and cannot be delivered over from hand to hand. So tithes,

(a) Co. Litt. 19, 20.

if

if we conſider the produce of them, as the tenth ſheaf or tenth lamb, ſeem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they, being merely a contingent right, collateral to or iſſuing out of lands, can never be the object of ſenſe: they are neither capable of being ſhewn to the eye, nor of being delivered into bodily poſſeſſion.

INCORPOREAL hereditaments are principally of ten ſorts; advowſons, tithes, commons, ways, offices, dignities, franchiſes, corodies or penſions, annuities, and rents.

I. ADVOWSON is the right of preſentation to a church, or eccleſiaſtical benefice. Advowſon, *advocatio*, ſignifies *in clientelam recipere*, the taking into protection; and therefore is ſynonymous with patronage, *patronatus*: and he who has the right of advowſon is called the patron of the church. For, when lords of manors firſt built churches on their own demeſnes, and appointed the tithes of thoſe manors to be paid to the officiating miniſters, which before were given to the clergy in common (from whence, as was formerly mentioned (b), aroſe the diviſion of pariſhes) the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating ſuch miniſter as he pleaſed (provided he was canonically qualified) to officiate in that church of which he was the founder, endower, maintainer, or, in one word, the patron (c).

THIS inſtance of an advowſon will completely illuſtrate the nature of an incorporeal hereditament. It is not itſelf the bodily poſſeſſion of the church and its appendages; but it is a right to give ſome other man a title to ſuch bodily poſſeſſion. The advowſon is the object of neither the ſight, nor the touch; and yet it perpetually exiſts in the mind's eye, and in contemplation of law It cannot be delivered from man to man by any viſible bo-

(b) Vol. I. pag. 109.

(c) This original of the *jus patronatus*, by building and endowing the church, appears alſo to have been allowed in the Roman empire. *Nov.* 56. *t.* 12. *c.* 2. *Nov.* 118. *c.* 23.

dily transfer, nor can any corporal poſſeſſion be had of it. If the patron takes corporal poſſeſſion of the church, the church-yard, the glebe or the like, he intrudes on another man's property; for to theſe the parſon has an excluſive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral or written, which is a kind of inviſible, mental transfer: and being ſo veſted, it lies dormant and unnoticed, till occaſion calls it forth; when it produces a viſible, corporeal fruit, by intitling ſome clerk, whom the patron ſhall pleaſe to nominate, to enter and receive bodily poſſeſſion of the lands and tenements of the church.

Advowsons are either advowſons *appendant*, or advowſons *in groſs*. Lords of manors being originally the only founders, and of courſe the only patrons, of churches (d), the right of patronage or preſentation, ſo long as it continues annexed to the poſſeſſion of the manor, as ſome have done from the foundation of the church to this day, is called an advowſon appendant (e): and it will paſs, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words (f). But where the property of the advowſon has been once ſeparated from the property of the manor, by legal conveyance, it is called an advowſon in groſs, or at large, and never can be appendant any more; but is for the future annexed to the perſon of its owner, and not to his manor or lands (g).

Advowsons are alſo either *preſentative*, *collative*, or *donative* (h). An advowſon preſentative is where the patron hath a right of preſentation to the biſhop or ordinary, and moreover to demand of him to inſtitute his clerk, if he find him canonically qualified: and this is the moſt uſual advowſon. An advowſon collative is where the biſhop and patron are one and the ſame perſon: in which caſe the biſhop cannot preſent to himſelf; but

(d) Co. Litt. 119.
(e) *Ibid.* 121.
(f) Co. Litt. 307.
(g) *Ibid.* 120.
(h) Co. Litt. 120.

he

he does, by the one act of collation, or conferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the king, or any subject by his licence, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction (i). This is said to have been antiently the only way of conferring ecclesiastical benefices in England; the method of institution by the bishop not being established more early than the time of arch-bishop Becket in the reign of Henry II. (k). And therefore though pope Alexander III (l), in a letter to Becket, severely inveighs against the *prava consuetudo*, as he calls it, of investiture conferred by the patron only, this however shews what was then the common usage. Others contend, that the claim of the bishops to institution is as old as the first planting of christianity in this island; and in proof of it they allege a letter from the English nobility to the pope, in the reign of Henry the third, recorded by Matthew Paris (m), which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron; till about the middle of the twelfth century, when the pope and his bishops endeavoured to introduce a kind of feodal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

HOWEVER this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and presents to the bishop, and his clerk is admitted and instituted, the ad-

(i) Co. Litt. 344.
(k) Seld. tith. c. 12. §. 2.
(l) *Decretal. l.* 3. *t.* 7. *c.* 3.
(m) *A. D.* 1239.

vowſon is now become for ever preſentative, and ſhall never be donative any more (n). For theſe exceptions to general rules, and common right, are ever looked upon by the law in an unfavourable view, and conſtrued as ſtrictly as poſſible. If therefore the patron, in whom ſuch peculiar right reſides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up for ever; and will therefore reduce it to the ſtandard of other eccleſiaſtical livings.

II. A SECOND ſpecies of incorporeal hereditaments is that of tithes; which are defined to be the tenth part of the increaſe, yearly ariſing and renewing from the profits of lands, the ſtock upon lands, and the perſonal induſtry of the inhabitants: the firſt ſpecies being uſually called *predial*, as of corn, graſs, hops, and wood (o); the ſecond *mixed*, as of wool, milk, pigs, &c. (p), conſiſting of natural products, but nurtured and preſerved in part by the care of man; and of theſe the tenth part muſt be paid in groſs: the third *perſonal*, as of manual occupations, trades, fiſheries, and the like; and of theſe only the tenth part of the clear gains and profits is due (q).

IT is not to be expected from the nature of theſe general commentaries, that I ſhould particularly ſpecify, what things are tithable, and what not, the time when, or the manner and proportion in which, tithes are uſually due. For this I muſt refer to ſuch authors as have treated the matter in detail: and ſhall only obſerve, that, in general tithes are to be paid for every thing that yields an annual increaſe, as corn, hay, fruit, cattle, poultry, and the like; but not for any thing that is of the ſubſtance of the earth, or is not of annual increaſe, as ſtone, lime, chalk, and the like: nor for creatures that are of a wild nature, or *ferae naturae*, as deer, hawks, &c. whoſe increaſe, ſo as to profit the owner, is not annual, but caſual (r). It will rather be our buſineſs to conſider, 1. The original of the right of tithes. 2. In whom

(n) Co. Litt. 344. Cro. Jac. 63.
(o) 1 Roll. Abr. 635. 2 Inſt. 649.
(p) *Ibid.*
(q) 1 Roll. Abr. 656.
(r) 2 Inſt. 651.

that

that right at preſent ſubſiſts. 3. Who may be diſcharged, either totally or in part, from paying them.

1. As to their original. I will not put the title of the clergy to the tithes upon any divine right; though ſuch a right certainly commenced, and I believe as certainly ceaſed, with the Jewiſh theocracy. Yet an honourable and competent maintenance for the miniſters of the goſpel, is, undoubtedly, *jure divino*; whatever the particular mode of that maintenance may be. For, beſides the poſitive precepts of the new teſtament, natural reaſon will tell us, that an order of men, who are ſeparated from the world, and excluded from other lucrative profeſſions, for the ſake of the reſt of mankind, have a right to be furniſhed with the neceſſaries, conveniences, and moderate enjoyments of life, at their expenſe, for whoſe benefit they forego the uſual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national prieſts or clergy: ours in particular hath eſtabliſhed this of tithes, probably in imitation of the Jewiſh law: and perhaps, conſidering the degenerate ſtate of the world in general, it may be more beneficial to the Engliſh clergy to found their title on the law of the land, than upon any divine right whatſoever, unacknowledged and unſupported by temporal ſanctions.

WE cannot preciſely aſcertain the time when tithes were firſt introduced into this country. Poſſibly they were cotemporary with the planting of chriſtianity among the Saxons, by Auguſtin the monk, about the end of the ſixth century. But the firſt mention of them, which I have met with in any written Engliſh law, is in a conſtitutional decree, made in a ſynod held *A. D.* 786 (s), wherein the payment of tithes in general is ſtrongly enjoined. This canon, or decree, which at firſt bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of eſtates, reſpective-

(s) Selden, c. 8. §. 2.

ly

ly conſiſting of the kings of Mercia and Northumberland, the biſhops, dukes, ſenators, and people. Which was a few years later than the time that Charlemagne eſtabliſhed the payment of them in France (t), and made that famous diviſion of them into four parts; one to maintain the edifice of the church, the ſecond to ſupport the poor, the third the biſhop, and the fourth the parochial clergy (v)

THE next authentic mention of them is in the *foedus Edwardi et Guthruni*; or the laws agreed upon between king Guthrun the Dane, and Alfred and his ſon Edward the elder, ſucceſſive kings of England, about the year 900. This was a kind of treaty between thoſe monarchs, which may be found at large in the Anglo-Saxon laws (u); wherein it was neceſſary, as Guthrun was a pagan, to provide for the ſubſiſtence of the chriſtian clergy under his dominion; and, accordingly, we find (w) the payment of tithes not only *enjoined*, but a *penalty* added upon non-obſervance: which law is ſeconded by thoſe of Athelſtan (x), about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

2. WE are next to conſider the perſons to whom they are due. And upon their firſt introduction (as hath formerly been obſerved) (y) though every man was obliged to pay tithes in general, yet he might give them to what prieſts he pleaſed (z); which were called *arbitrary* conſecrations of tithes: or he might pay them into the hands of the biſhop, who diſtributed among his dioceſan clergy the revenues of the church, which were then in common (a). But, when dioceſes were divided into pariſhes, the tithes of each pariſh were allotted to its own particular miniſter: firſt by common conſent, or the appointments of lords of manors, and afterwards by the written law of the land (b).

(t) *A. D.* 778.
(v) Book I. ch. 11. Seld. c. 6. §. 7. Sp of laws, b. 31. c. 12.
(u) Wilkins, pag. 51.
(w) *cap.* 6.
(x) *cap.* 1.
(y) Book I. Introd §. 4.
(z) 2 Inſt. 646. Hob. 296.
(a) Seld. c. 9. §. 4.
(b) *LL. Edgar. c.* 1 & 2. *Canut. c.* 11.

How-

HOWEVER, arbitrary conſecrations of tithes took place again afterwards, and became in general uſe till the time of king John (c). Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under archbiſhop Dunſtan and his ſucceſſors; who endeavoured to wean the people from paying their dues to the ſecular or parochial clergy, (a much more valuable ſet of men than themſelves) and were then in hopes to have drawn, by ſanctimonious pretences to extraordinary purity of life, all eccleſiaſtical profits to the coffers of their own ſocieties. And this will naturally enough account for the number and riches of the monaſteries and religious houſes, which were founded in thoſe days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes ſomewhere, might think it good policy to erect an abbey, and there pay them to his own monks: or grant them to ſome abbey already erected; ſince for this dotation, which really coſt the patron little or nothing, he might, according to the ſuperſtition of the times, have maſſes for ever ſung for his ſoul. But, in proceſs of years, the income of the poor laborious pariſh prieſts being ſcandalouſly reduced by theſe arbitrary conſecrations of tithes, it was remedied by pope Innocent the third (d) about the year 1200 in a decretal epiſtle, ſent to the archbiſhop of Canterbury, and dated from the palace of Lateran: which has occaſioned ſir Henry Hobart and others to miſtake it for a decree of the council of Lateran held *A. D.* 1179, which only prohibited what was called the infeodation of tithes, or their being granted to mere laymen (e); whereas this letter of pope Innocent to the archbiſhop enjoined the payment of tithes to the parſons of the reſpective pariſhes where every man inhabited, agreeable to what was afterwards directed by the ſame pope in other countries (f). This epiſtle, ſays ſir Edward Coke (g), bound not the lay ſubjects of this realm; but, being reaſonable and juſt (and, he might have added,

(c) Selden. c. 11.
(d) *Opera Innocent. III. tom.* 2. *pag.* 452.
(e) *Decretal. l.* 3. *t.* 30. *c.* 19.
(f) *Ibid. c.* 26.
(g) 2 Inſt. 641.

being

being correſpondent to the antient law) it was allowed of, and ſo became *lex terrae*. This put an effectual ſtop to all the arbitrary conſecrations of tithes; except ſome footſteps which ſtill continue of thoſe portions of tithes, which the parſon of one pariſh hath, though rarely, a right to claim in another: for it is now univerſally held (h), that tithes are due, of common right, to the parſon of the pariſh, unleſs there be a ſpecial exemption. This parſon of the pariſh, we have formerly ſeen (i), may be either the actual incumbent, or elſe the appropriator of the benefice: appropriations being a method of endowing monaſteries, which ſeems to have been deviſed by the regular clergy, by way of ſubſtitution to arbitrary conſecrations of tithes (k).

3. We obſerved that tithes are due to the parſon of common right, unleſs by ſpecial exemption: let us therefore ſee, thirdly, who may be exempted from the payment of tithes, and how. Lands, and their occupiers, may be exempted or diſcharged from the payment of tithes, either in part or totally, firſt, by a real compoſition; or, ſecondly, by cuſtom or preſcription.

First, a real compoſition is when an agreement is made between the owner of the lands, and the parſon or vicar, with the conſent of the ordinary and of the patron, that ſuch lands ſhall for the future be diſcharged from payment of tithes, by reaſon of ſome land or other real recompenſe given to the parſon, in lieu and ſatisfaction thereof (l). This was permitted by law, becauſe it was ſuppoſed that the clergy would be no loſers by ſuch compoſition; ſince the conſent of the ordinary, whoſe duty it is to take care of the church in general, and of the patron, whoſe intereſt it is to protect that particular church, were both made neceſſary to render the compoſition effectual: and hence have ariſen all ſuch compoſitions as exiſt at this day by force of the common law. But, experience ſhewing that even this caution

(h) Regiſt. 46. Hob. 296.
(i) Book I. pag. 372.
(k) In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See book I. pag. 110.
(l) 2 Inſt. 490. Regiſt. 38. 13 Rep. 40.

was

was ineffectual, and the poſſeſſions of the church being, by this and other means, every day diminiſhed, the diſabling ſtatute 13 Eliz. c. 10. was made, which prevents, among other ſpiritual perſons, all parſons and vicars from making any conveyances of the eſtates of their churches, other than for three lives or twenty one years. So that now, by virtue of this ſtatute, no real compoſition made ſince the 13 Eliz. is good for any longer term than three lives or twenty one years, though made by conſent of the patron and ordinary: which has indeed effectually demoliſhed this kind of traffick; ſuch compoſitions being now rarely heard of, unleſs by authority of parliament.

SECONDLY, a diſcharge by cuſtom or preſcription, is where time out of mind ſuch perſons or ſuch lands have been, either partially or totally, diſcharged from the payment of tithes. And this immemorial uſage is binding upon all parties, as it is in its nature an evidence of univerſal conſent and acquieſcence; and with reaſon ſuppoſes a real compoſition to have been formerly made. This cuſtom or preſcription is either *de modo decimandi*, or *de non decimando*.

A *modus decimandi*, commonly called by the ſimple name of a *modus* only, is where there is by cuſtom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increaſe. This is ſometimes a pecuniary compenſation, as twopence an acre for the tithe of land: ſometimes it is a compenſation in work and labour, as that the parſon ſhall have only the twelfth cock of hay, and not the tenth, in conſideration of the owner's making it for him: ſometimes, in lieu of a large quantity of crude or imperfect tithe, the parſon ſhall have a leſs quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in ſhort, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or ſpecial manner of tithing.

To

To make a good and ſufficient *modus*, the following rules muſt be obſerved. 1. It muſt be *certain* and *invariable* (m); for payment of different ſums will prove it to be no *modus*, that is, no original real compoſition; becauſe that muſt have been one and the ſame, from its firſt original to the preſent time. 2. The thing given, in lieu of tithes, muſt be beneficial to the *parſon*, and not for the emolument of *third perſons* only (n): thus a *modus*, to repair the *church* in lieu of tithes, is not good, becauſe that is an advantage to the pariſh only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parſon. 3. It muſt be ſomething *different* from the thing compounded for (o): one load of hay, in lieu of *all* tithe hay, is no good *modus*: for no parſon would, *bona fide*, make a compoſition to receive leſs than his due in the ſame ſpecies of tithe; and therefore the law will not ſuppoſe it poſſible for ſuch compoſition to have exiſted. 4. One cannot be diſcharged from payment of one ſpecies of tithe, by paying a *modus* for another (p). Thus a *modus* of 1 *d.* for every *milch* cow will diſcharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one ſhall never be a diſcharge for the other. 5. The recompenſe muſt be in its nature as durable as the tithes diſcharged by it; that is, an inheritance certain (q): and therefore a *modus* that every *inhabitant* of a houſe ſhall pay 4 *d.* a year, in lieu of the owner's tithes, is no good *modus*; for poſſibly the houſe may not be inhabited, and then the recompenſe will be loſt. 6. The *modus* muſt not be too large, which in law is called a *rank modus*: as if the real value of the tithes be 60 *l. per annum*, and a *modus* is ſuggeſted of 40 *l.* this *modus* will not be good; though one of 40 *s.* might have been valid (r). For, in theſe caſes of preſcriptive or cuſtomary *modus's*, the law ſuppoſes an original real compoſition to have been regularly made; which being loſt by length of time, the immemorial uſage is admitted

(m) 1 Keb. 602.
(n) 1 Roll. Abr. 649.
(o) 1 Lev. 179.
(p) Cro. Eliz. 446. Salk. 657.
(q) 2 P. W^ms. 462.
(r) 11 Mod. 60.

as evidence to ſhew that it once did exiſt, and that from thence ſuch uſage was derived. Now time of memory hath been long ago aſcertained by the law to commence from the reign of Richard the firſt (s); and any cuſtom may be deſtroyed by evidence of its non-exiſtence in any part of the long period from his days to the preſent: wherefore, as this real compoſition is ſuppoſed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* ſet up is ſo rank and large, as that it beyond diſpute exceeds the value of the tithes in the time of Richard the firſt, this *modus* is *felo de ſe* and deſtroys itſelf. For, as it would be deſtroyed by any direct evidence to prove its non-exiſtence at any time ſince that aera, ſo alſo it is deſtroyed by carrying in itſelf this internal evidence of a much later original.

A PRESCRIPTION *de non decimando* is a claim to be entirely diſcharged of tithes, and to pay no compenſation in lieu of them. Thus the king by his prerogative is diſcharged from all tithes (t). So a vicar ſhall pay no tithes to the rector, nor the rector to the vicar, for *eccleſia decimas non ſolvit eccleſiae* (u). But theſe privileges are *perſonal* to both the king and the clergy; for their tenant or leſſee ſhall pay tithes of the ſame land, though in their own occupation it is not tithable. And, generally ſpeaking, it is an eſtabliſhed rule, that in *lay* hands, *modus de non decimando non valet* (w). But ſpiritual perſons or corporations, as monaſteries, abbots, biſhops, and the like, were always capable of having their lands totally diſcharged of tithes, by various ways (x): as, 1. By real compoſition: 2. By the pope's bull of exemption: 3. By unity of poſſeſſion; as when the rectory of a pariſh, and lands in the ſame pariſh, both belonged to a religious houſe, thoſe lands

(s) This rule was adopted, when by the ſtatute of Weſtm. 1. (3 Edw. I. c. 39) the reign of Richard I. was made the time of limitation in a writ of right. But, ſince by the ſtatute 32 Hen. VIII. c. 2. this period (in a writ of right) hath been very rationally reduced to ſixty years, it ſeems unaccountable, that the date of legal preſcription or memory ſhould ſtill continue to be reckoned from an aera ſo very antiquated. See 2 Roll. Abr. 269. pl. 16.

(t) Cro. Eliz. 511.

(u) *Ibid.* 479.

(w) *Ibid.* 511.

(x) Hob. 309. Cro. Jac. 308.

were

were diſcharged of tithes by this unity of poſſeſſion: 4. By preſcription; having never been liable to tithes, by being always in ſpiritual hands: 5. By virtue of their order; as the knights templars, ciſtercians, and others, whoſe lands were privileged by the pope with a diſcharge of tithes (y). Though, upon the diſſolution of abbeys by Henry VIII, moſt of theſe exemptions from tithes would have fallen with them, and the lands become tithable again; had they not been ſupported and upheld by the ſtatute 31 Hen. VIII. c. 13. which enacts, that all perſons who ſhould come to the poſſeſſion of the lands of any abbey then diſſolved, ſhould hold them free and diſcharged of tithes, in as large and ample a manner as the abbeys themſelves formerly held them. And from this original have ſprung all the lands, which, being in lay hands, do at preſent claim to be tithe-free: for, if a man can ſhew his lands to have been ſuch abbey lands, and alſo immemorially diſcharged of tithes by any of the means before-mentioned, this is now a good preſcription *de non decimando*. But he muſt ſhew both theſe requiſites: for abbey lands, without a ſpecial ground of diſcharge, are not diſcharged of courſe; neither will any preſcription *de non decimando* avail in total diſcharge of tithes, unleſs it relates to ſuch abbey lands.

III. COMMON, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beaſts, to catch fiſh, to dig turf, to cut wood, or the like (z). And hence common is chiefly of four ſorts; common of paſture, of piſcary, of turbary, and of eſtovers.

1. COMMON of paſture is a right of feeding one's beaſts on another's land; for in thoſe waſte grounds, which are uſually called commons, the property of the ſoil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, becauſe of vicinage, or in groſs (a).

(y) 2 Rep. 44. Seld. tith. c. 13. §. 2. (z) Finch, law. 157. (a) Co. Litt. 122.

COMMON

COMMON *appendant* is a right, belonging to the owners or occupiers of arable land, to put commonable beaſts upon the lord's waſte, and upon the lands of other perſons within the ſame manor. Commonable beaſts are either beaſts of the plough, or ſuch as manure the ground. This is a matter of moſt univerſal right; and it was originally permitted (b), not only for the encouragement of agriculture, but for the neceſſity of the thing. For, when lords of manors granted out parcels of lands to tenants, for ſervices ether done or to be done, theſe tenants could not plough or manure the land without beaſts; theſe beaſts could not be ſuſtained without paſture; and paſture could not be had but in the lord's waſtes, and on the unincloſed fallow grounds of themſelves and the other tenants. The law therefore annexed this right of common, as inſeparably incident, to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and other northern kingdoms, much in the ſame manner as in England (c). Common *appurtenant* is where the owner of land has a right to put in other beaſts, beſides ſuch as are generally commonable; as hogs, goats, and the like, which neither plough nor manure the ground. This, not ariſing from the neceſſity of the thing, like common appendant, is therefore not of common right; but can only be claſmed by immemorial uſage and preſcription (d), which the law eſteems ſufficient proof of a ſpecial grant or agreement for this purpoſe. Common *becauſe of vicinage*, or neighbourhood, is where the inhabitants of two townſhips, which lie contiguous to each other, have uſually intercommoned with one another; the beaſts of the one ſtraying mutually into the other's fields, without any moleſtation from either. This is indeed only a permiſſive right, intended to excuſe what in ſtrictneſs is a treſpaſs in both, and to prevent a multiplicity of ſuits: and therefore either townſhip may encloſe and bar out the other, though they have intercommoned time out of mind. Neither hath any perſon of one town a right to put

(b) 2 Inſt. 86. (c) Stiernh. *de jure Sueonum. l.* 2. *c.* 6. (d) Co. Litt. 122.

his beaſts originally into the other's common; but if they eſcape, and ſtray thither of themſelves, the law winks at the treſpaſs (e). Common *in groſs*, or at large, is ſuch as is neither appendant nor appurtenant to land, but is annexed to a man's perſon; being granted to him and his heirs by deed: or it may be claimed by preſcriptive right, as by parſon of a church, or the like corporation ſole. This is a ſeparate inheritance, entirely diſtinct from any landed property, and may be veſted in one who has not a foot of ground in the manor.

ALL theſe ſpecies of paſturable common, may be, and uſually are limited as to number and time; but there are alſo commons without ſtint, which laſt all the year. By the ſtatute of Merton however, and other ſubſequent ſtatutes (f), the lord of the manor may encloſe ſo much of the waſte as he pleaſes, for tillage and woodground, provided he leaves common ſufficient for thoſe that are entitled thereto. This encloſure, when juſtifiable, is called in law "approving;" an antient expreſſion ſignifying the ſame as "improving (g)." The lord hath the ſole intereſt in the ſoil; but the intereſt of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done, either againſt ſtrangers, or each other; the lord for the public injury, and each commoner for his private damage (h).

2, 3. COMMON of piſcary is a liberty of fiſhing in another man's waters; as common of turbary is a liberty of digging turf upon another's ground (i). There is alſo a common of digging for coals, minerals, ſtones, and the like. All theſe bear a reſemblance to common of paſture in many reſpects; though in one point they go much farther: common of paſture being only a right of feeding on the herbage and veſture of the ſoil, which renews annually; but common of turbary, and the reſt, are a right of carrying away the very ſoil itſelf.

(e) Co. Litt. 122.
(f) 20 Hen. III. c. 4. 29 Geo. II. c. 36. and 31 Geo. II. c. 41.
(g) 2 Inſt. 474.
(h) 9 Rep. 113.
(i) Co. Litt. 122.

4. COM-

4. COMMON of eſtovers (from *eſtoffer*, to furniſh) is a liberty of taking neceſſary wood, for the uſe or furniture of a farm, from off another's eſtate. The Saxon word, *bote*, is of the ſame ſignification with the French *eſtovers*; and therefore houſe-bote is a ſufficient allowance of wood, to repair, or to burn in, the houſe; which latter is ſometimes called fire-bote: plough-bote and cart-bote are wood to be employed in making and repairing all inſtruments of huſbandry: and hay-bote or hedge-bote is wood for repairing of hays, hedges, or fences. Theſe botes or eſtovers muſt be reaſonable ones; and ſuch any tenant or leſſee may take off the land let or demiſed to him, without waiting for any leave, aſſignment, or appointment of the leſſor, unleſs he be reſtrained by ſpecial covenant to the contrary (k).

THESE ſeveral ſpecies of commons do all originally reſult from the ſame neceſſity as common of paſture; *viz.* for the maintenance and carrying on of huſbandry; common of piſcary being given for the ſuſtenance of the tenant's family; common of turbary and fire-bote for his fuel; and houſe-bote, plough-bote, cart-bote, and hedge-bote, for repairing his houſe, his inſtruments of tillage, and the neceſſary fences of his grounds.

IV. A FOURTH ſpecies of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. I ſpeak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the field; but of private ways, in which a particular man may have an intereſt and a right, though onother be owner of the ſoil. This may be grounded on a ſpecial permiſſion; as when the owner of the land grants to another a liberty of paſſing over his grounds, to go to church, to market, or the like: in which caſe the gift or grant is particular, and confined to the grantee alone; it dies with the perſon; and, if the grantee leaves the country, he cannot aſſign over his right to any other; nor can he juſtify

(k) Co. Litt. 41.

taking another perſon in his company (l). A way may be alſo by preſcription; as if all the owners and occupiers of ſuch a farm have immemorially uſed to croſs another's ground: for this immemorial uſage ſuppoſes an original grant, whereby a right of way thus appurtenant to land may clearly be created. A right of way may alſo ariſe by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the ſame time tacitly and impliedly gives me a way to come at it; and I may croſs his land for that purpoſe without treſpaſs (m). For when the law doth give any thing to one, it giveth impliedly whatſoever is neceſſary for enjoying the ſame (n). By the law of the twelve tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleaſed: which was the eſtabliſhed rule in public as well as private ways. And the law of England, in both caſes, ſeems to correſpond with the Roman (o).

V. OFFICES, which are a right to exerciſe a public or private employment, and to the fees and emoluments thereunto belonging, are alſo incorporeal hereditaments: whether public, as thoſe of magiſtrates; or private, as of bailiffs, receivers, and the like. For a man may have an eſtate in them, either to him and his heirs, or for life, or for a term of years, or during pleaſure only: ſave only that offices of public truſt cannot be granted for a term of years, eſpecially if they concern the adminiſtration of juſtice, for then they might perhaps veſt in executors or adminiſtrators (p). Neither can any *judicial* office be granted in reverſion; becauſe, though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and inſufficient: but *miniſterial* offices may be ſo granted (q); for thoſe may be executed by deputy. Alſo, by ſtatute 5 and 6 Edw. VI. c. 16. no public office ſhall be ſold, under pain of diſability to diſpoſe of or hold it. For the law preſumes that he, who buys

(l) Finch. law. 31,
(m) *Ibid.* 63.
(n) Co. Litt. 56.
(o) Lord Raym. 725. 1 Brownl, 212. 2 Show. 28. 1 Jon. 297.
(p) 9 Rep. 97.
(q) 11 Rep. 4.

an

an office, will by bribery, extortion, or other unlawful means, make his purchaſe good, to the manifeſt detriment of the public.

VI. DIGNITIES bear a near relation to offices. Of the nature of theſe we treated at large in the former book (r); it will therefore be here ſufficient to mention them as a ſpecies of incorporeal hereditaments, wherein a man may have a property or eſtate.

VII. FRANCHISES are a ſeventh ſpecies. Franchiſe and liberty are uſed as ſynonymous terms: and their definition is (s), a royal privilege, or branch of the king's prerogative, ſubſiſting in the hands of a ſubject. Being therefore derived from the crown, they muſt ariſe from the king's grant; or, in ſome caſes, may be held by preſcription, which, as has been frequently ſaid, preſuppoſes a grant. The kinds of them are various, and almoſt infinite: I will here briefly touch upon ſome of the principal; premiſing only, that they may be veſted in either natural perſons or bodies politic; in one man, or in many: but the ſame identical franchiſe, that has before been granted to one, cannot be beſtowed on another; for that would prejudice the former grant (t).

To be a county palatine is a franchiſe, veſted in a number of perſons. It is likewiſe a franchiſe for a number of perſons to be incorporate, and ſubſiſt as a body politic, with a power to maintain perpetual ſucceſſion and do other corporate acts: and each individual member of ſuch corporation is alſo ſaid to have a franchiſe or freedom. Other franchiſes are, to hold a court leet: to have a manor or lordſhip; or, at leaſt, to have a lordſhip paramount: to have waifs, wrecks, eſtrays, treaſure-trove, royal-fiſh, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying cauſes: to have the cognizance of pleas; which is a ſtill greater liberty, being an excluſive right, ſo that no other court ſhall try cauſes ariſing within that juriſdiction: to have a bailiwick, or liberty exempt from the ſheriff of the county, wherein the grantee only, and his officers, are to

(r) See Book I. ch. 12. (s) Finch. L. 164. (t) 2 Roll. Abr. 191. Keilw. 196.

execute all proceſs: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls muſt have a reaſonable cauſe of commencement, (as in conſideration of repairs, or the like) elſe the franchiſe is illegal and void (u): or, laſtly, to have a foreſt, chaſe, park, warren, or fiſhery, endowed with privileges of royalty; which ſpecies of franchiſe may require a more minute diſcuſſion.

As to a *foreſt*: this, in the hands of a ſubject, is properly the ſame thing with a chaſe; being ſubject to the common law, and not to the foreſt laws (v). But a *chaſe* differs from a park, in that it is not encloſed, and alſo in that a man may have a chaſe in another man's ground as well as his own; being indeed the liberty of keeping beaſts of chaſe or royal game therein, protected even from the owner of the land, with a power of hunting them thereon. A *park* is an encloſed chaſe, extending only over a man's own grounds. The word *park* indeed properly ſignifies any encloſure; but yet it is not every field or common, which a gentleman pleaſes to ſurround with a wall or paling, and to ſtock with a herd of deer, that is thereby conſtituted a legal park: for the king's grant, or at leaſt immemorial preſcription, is neceſſary to make it ſo (w). Though now the difference between a real park, and ſuch encloſed grounds, is in many reſpects not very material: only that it is unlawful at common law for any perſon to kill any beaſts of park or chaſe (x), except ſuch as poſſeſs theſe franchiſes of foreſt, chaſe, or park. *Free-warren* is a ſimilar franchiſe, erected for preſervation or cuſtody (which the word ſignifies) of beaſts and fowls of warren (y); which, being *ferae naturae*, every one had a natural right to kill as he could:

(u) 2 Inſt. 220.

(v) 4 Inſt. 314.

(w) Co. Litt. 233. 2 Inſt. 199. 11 Rep. 86.

(x) Theſe are properly buck, doe, fox, martin, and roe; but in a common and legal ſenſe extend likewiſe to all the beaſts of the foreſt: which, beſides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beaſts of venary or hunting. (Co. Litt. 233.)

(y) The beaſts are hares, conies, and roes: the fowls are either *campeſtres*, as partridges, rails, and quails; or *ſylveſtres*, as wood-cocks and pheaſants; or *aquatiles*, as mallards and herons. *(Ibid.)*

but

but upon the introduction of the foreſt laws at the Norman conqueſt, as will be ſhewn hereafter, theſe animals being looked upon as royal game, and the ſole property of our ſavage monarchs, this franchiſe of free-warren was invented to protect them; by giving the grantee a ſole and excluſive power of killing ſuch game, as far as his warren extended, on condition of his preventing other perſons. A man therefore that has the franchiſe of warren, is in reality no more than a royal game-keeper: but no man, not even a lord of a manor, could by common law juſtify ſporting on another's ſoil, nor even on his own, unleſs he had the liberty of free-warren (z). This franchiſe is almoſt fallen into diſregard, ſince the new ſtatutes for preſerving the game; the name being now chiefly preſerved in grounds that are ſet apart for breeding hares and rabbets. There are many inſtances of keen ſportſmen in antient times, who have ſold their eſtates, and reſerved the free-warren, or right of killing game, to themſelves; by which means it comes to paſs that a man and his heirs have ſometimes free-warren over another's ground (a). A *free-fiſhery*, or excluſive right of fiſhing in a public river, is alſo a royal franchiſe; and is conſidered as ſuch in all countries where the feodal polity has prevailed (b): though the making ſuch grants, and by that means appropriating what ſeems to be unnatural to reſtrain, the uſe of running water, was prohibited for the future by king John's great charter, and the rivers that were fenced in his time were directed to be laid open, as well as the foreſts to be diſafforeſted (c). This opening was extended, by the ſecond (d) and third (e) charters of Henry III, to thoſe alſo that were fenced under Richard I; ſo that a franchiſe of free fiſhery ought now to be at leaſt as old as the reign of Henry II. This differs from a *ſeveral* fiſhery; becauſe he that has a ſeveral fiſhery muſt alſo be the owner of the ſoil, which in a free fiſhery is not requiſite. It differs alſo from a *common* of piſcary before-mentioned, in that

(z) Salk. 637.
(a) Bro. *Abr. tit. Warren*, 3.
(b) Seld. *Mar. clauſ. I.* 24. Duareſne. V. 503. Craig. *de Jur. feod.* II. 8. 15.
(c) *cap.* 47. *edit. Oxon.*
(d) *cap.* 20.
(e) 9 Hen. III. c. 16.

the free fiſhery is an excluſive right, the common of piſcary is not ſo: and therefore, in a free fiſhery, a man has a property in the fiſh before they are caught; in a common piſcary, not till afterwards (f). Some indeed have conſidered a *free* fiſhery not as a royal franchiſe, but merely as a private grant of a liberty to fiſh in the *ſeveral* fiſhery of the grantor (g). But the conſidering ſuch right as originally a flower of the prerogative, till reſtrained by *magna carta*, and derived by royal grant (previous to the reign of Richard I.) to ſuch as now claim it by preſcription, may remove ſome difficulties in reſpect to this matter, with which our books are embaraſſed.

VIII. CORODIES are a right of ſuſtenance, or to receive certain allotments of victual and proviſion for one's maintenance (h). In lieu of which (eſpecially when due from eccleſiaſtical perſons) a penſion or ſum of money is ſometimes ſubſtituted (i). And theſe may be reckoned another ſpecies of incorporeal hereditaments; though not chargeable on, or iſſuing from, any corporeal inheritance, but only charged on the perſon of the owner in reſpect of ſuch his inheritance. To theſe may be added,

IX. ANNUITIES, which are much of the ſame nature; only that they ariſe from temporal, as the former from ſpiritual, perſons. An annuity is a thing very diſtinct from a rent-charge, with which it is frequently confounded: a rent-charge being a burthen impoſed upon and iſſuing out of *lands*, whereas an annuity is a yearly ſum chargeable only upon the *perſon* of the grantor (j). Therefore, if a man by deed grant to another the ſum of 20*l. per annum*, without expreſſing out of what lands it ſhall iſſue, no land at all ſhall be charged with it; but it is a mere perſonal annuity: which is of ſo little account in the law, that, if granted to an eleemoſynary corporation, it is not within the ſtatutes of mortmain (k); and, yet a man may have a real eſtate in it, though his ſecurity is merely perſonal.

(f) F. N. B. 88. Salk. 637.
(g) 2 Sid. 8.
(h) Finch. L. 162.
(i) See Book I. ch. 8.
(j) Co. Litt. 144.
(k) *Ibid.* 2.

X. RENTS

X. RENTS are the laſt ſpecies of incorporeal hereditaments. The word, rent, or render, *reditus*, ſignifies a compenſation, or return; it being in the nature of an acknowlegement given for the poſſeſſion of ſome corporeal inheritance (l). It is defined to be a certain profit iſſuing yearly out of lands and tenements corporeal. It muſt be a *profit*; yet there is no occaſion for it to be, as it uſually is, a ſum of money: for ſpurs, capons, horſes, corn, and other matters may be rendered, and frequently are rendered, by way of rent (m). It may alſo conſiſt in ſervices or manual operations; as, to plough ſo many acres of ground, to attend the king or the lord to the wars, and the like; which ſervices in the eye of the law are profits. This profit muſt alſo be *certain*; or that which may be reduced to a certainty by either party. It muſt alſo iſſue *yearly*; though there is no occaſion for it to iſſue every ſucceſſive year; but it may be reſerved every ſecond, third, or fourth year (n): yet, as it is to be produced out of the profits of lands and tenements, as a recompenſe for being permitted to hold and enjoy them, it ought to be reſerved yearly, becauſe thoſe profits do annually ariſe and are annually renewed. It muſt *iſſue out* of the thing granted, and not be part of the land or thing itſelf; wherein it differs from an exception in the grant, which is always of part of the thing granted (o). It muſt, laſtly, iſſue out of *lands and tenements corporeal*; that is, from ſome inheritance whereunto the owner or grantee of the rent may have recourſe to diſtrein. Therefore a rent cannot be reſerved out of an advowſon, a common, an office, a franchiſe, or the like (p). But a grant of ſuch annuity or ſum may operate as a perſonal contract, and oblige the grantor to pay the money reſerved, or ſubject him to an action of debt (q); though it doth not affect the inheritance, and is no legal rent in contemplation of law.

THERE are at common law (r) three manner of rents; rent-ſervice, rent-charge, and rent-ſeck. *Rent-ſervice* is ſo called

(l) Co. Litt. 144.
(m) *Ibid.* 142.
(n) *Ibid.* 47.
(o) Plowd. 13. 8 Rep. 71.
(p) Co. Litt. 144.
(q) *Ibid.* 47.
(r) Litt. §. 213.

becauſe

becauſe it hath ſome corporeal ſervice incident to it, as at the leaſt fealty, or the feodal oath of fidelity (s). For, if a tenant holds his lands by fealty, and ten ſhillings rent; or by the ſervice of ploughing the lord's land, and five ſhillings rent; theſe pecuniary rents, being connected with perſonal ſervices, are therefore called rent-ſervice. And for theſe, in caſe they be behind, or arrere, at the day appointed, the lord may diſtrein of common right, without reſerving any ſpecial power of diſtreſs; provided he hath in himſelf the reverſion, or future eſtate of the lands and tenements, after the leaſe or particular eſtate of the leſſee or grantee is expired (t). A *rent-charge*, is where the owner of the rent hath no future intereſt, or reverſion expectant in the land; as where a man by deed maketh over to others his *whole* eſtate in fee ſimple, with a certain rent payable thereout, and adds to the deed a covenant or clauſe of diſtreſs, that if the rent be arrere, or behind, it ſhall be lawful to diſtrein for the ſame. In this caſe the land is liable to the diſtreſs, not of common right, but by virtue of the clauſe in the deed: and therefore it is called a rent-*charge*, becauſe in this manner the land is charged with a diſtreſs for the payment of it (u). *Rent-ſeck*, *reditus ſiccus*, or barren rent, is in effect nothing more than a rent reſerved by deed, but without any clauſe of diſtreſs.

THERE are alſo other ſpecies of rents, which are reducible to theſe three. Rents *of aſſiſe* are the certain eſtabliſhed rents of the freeholders and antient copyholders of a manor (w), which cannot be departed from or varied. Thoſe of the freeholders are frequently called *chief* rents, *reditus capitales*; and both ſorts are indifferently denominated *quit* rents, *quieti reditus*; becauſe thereby the tenant goes quit and free of all other ſervices. When theſe payments were reſerved in ſilver or white money, they were antiently called *white*-rents, or *blanch-farms*, *reditus albi* (x); in contradiſtinction to rents, reſerved in work, grain, *&c.* which were called *reditus nigri*,

(s) Co. Litt. 142.
(t) Litt. §. 215.
(u) Co. Litt. 143.
(w) 2 Inſt. 19.

(x) In Scotland this kind of ſmall payment is called *blench-holding*, or *reditus albae firmae*.

or

or *black-maile* (y). *Rack*-rent is only a rent of the full value of the tenement, or near it. A *feefarm* rent is a rent-charge iſſuing out of an eſtate in fee; of at leaſt one fourth of the value of the lands, at the time of its reſervation (z); for a grant of lands, reſerving ſo conſiderable a rent, is indeed only letting lands to farm in fee ſimple inſtead of the uſual methods for life or years.

THESE are the general diviſions of rent; but the difference between them (in reſpect to the remedy for recovering them) is now totally aboliſhed; and all perſons may have the like remedy by diſtreſs for rent-ſeck, rents of aſſiſe, and chief-rents, as in the caſe of rents reſerved upon leaſe (a).

RENT is regularly due and payable upon the land from whence it iſſues, if no particular place is mentioned in the reſervation (b); but, in caſe of the king, the payment muſt be either to his officers at the exchequer, or to his receiver in the country (c). And, ſtrictly, the rent is demandable and payable before the time of ſunſet of the day whereon it is reſerved (d); though ſome have thought it not abſolutely due till midnight (e).

WITH regard to the original of rents, ſomething will be ſaid in the next chapter: and, as to diſtreſſes and other remedies for their recovery, the doctrine relating thereto, and the ſeveral proceedings thereon, theſe belong properly to the third part of our commentaries, which will treat of civil injuries, and the means whereby they are redreſſed.

(y) 2 Inſt. 19.
(z) Co. Litt. 143.
(a) Stat. 4 Geo. II. c. 28.
(b) Co. Litt. 201.
(c) 4 Rep. 73.
(d) Anderſ. 253.
(e) 1 Saund. 287. 1 Chan. Prec. 555.

CHAPTER

Chapter the fourth.

Of the FEODAL SYSTEM.

IT is impoſſible to underſtand, with any degree of accuracy, either the civil conſtitution of this kingdom, or the laws which regulate its landed property, without ſome general acquaintance with the nature and doctrine of feuds, or the feodal law: a ſyſtem ſo univerſally received throughout Europe upwards of twelve centuries ago, that ſir Henry Spelman (a) does not ſcruple to call it the law of nations in our weſtern world. This chapter will be therefore dedicated to this inquiry. And though, in the courſe of our obſervations in this and many other parts of the preſent book, we may have occaſion to ſearch pretty highly into the antiquities of our Engliſh juriſprudence, yet ſurely no induſtrious ſtudent will imagine his time miſ-employed, when he is led to conſider that the obſolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a ſcholarlike ſcientifical manner, without having recourſe to the antient. Nor will theſe reſearches be altogether void of rational entertainment as well as uſe: as in viewing the majeſtic ruins of Rome or Athens, of Balbec or Palmyra, it adminiſters both pleaſure and inſtruction to compare them with the draughts of the ſame edifices, in their priſtine proportion and ſplendor.

(a) of parliaments. 57.

The

THE conſtitution of feuds (b) had its original from the military policy of the northern or Celtic nations, the Goths, the Hunns, the Franks, the Vandals, and the Lombards, who all migrating from the ſame *officina gentium*, as Crag very juſtly intitles it (c), poured themſelves in vaſt quantities into all the regions of Europe, at the declenſion of the Roman empire. It was brought by them from their own countries, and continued in their reſpective colonies as the moſt likely means to ſecure their new acquiſitions: and to that end, large diſtricts or parcels of land were allotted by the conquering general to the ſuperior officers of the army, and by them dealt out again in ſmaller parcels or allotments to the inferior officers and moſt deſerving ſoldiers (d). Theſe allotments were called *feoda*, feuds, fiefs, or fees; which laſt appellation in the northern languages (e) ſignifies a conditional ſtipend or reward (f). Rewards or ſtipends they evidently were; and the condition annexed to them was, that the poſſeſſor ſhould do ſervice faithfully, both at home and in the wars, to him by whom they were given; for which purpoſe he took the *juramentum fidelitatis*, or oath of fealty (g): and in caſe of the breach of this condition and oath, by not performing the ſtipulated ſervice, or by deſerting the lord in battle, the lands were again to revert to him who granted them (h).

ALLOTMENTS thus acquired, naturally engaged ſuch as accepted them to defend them: and, as they all ſprang from the

(b) See Spelman of feuds, and Wright of tenures, *per tot.*

(c) *De jure feod.* 19, 20.

(d) Wright. 7.

(e) Spelm. *Gl.* 216.

(f) Pontoppidan in his hiſtory of Norway (page 290.) obſerves that in the northern language ODH ſignifies *proprietas* and ALL *totum*. Hence he derives the ODHAL right in thoſe countries; and hence too perhaps is derived the *udal* right in Finland, &c. (See Mac Doual. Inſt. part. 2.) Now the tranſpoſition of theſe northern ſyllables, ALLODH, will give us the true etymology of the allodium, or abſolute property of the feudiſts; as, by a ſimilar combination of the latter ſyllable with the word FEE (which ſignifies, we have ſeen, a conditional reward or ſtipend) FEEODH or *feodum* will denote ſtipendiary property.

(g) See the Oath explained at large in *Feud. l.* 2. *t.* 7.

(h) *Feud. l.* 2. *t.* 24.

ſame

ſame right of conqueſt, no part could ſubſiſt independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's poſſeſſions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpoſe, ſubordination, was neceſſary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewiſe ſubordinate to and under the command of his immediate benefactor or ſuperior; and ſo upwards to the prince or general himſelf. And the ſeveral lords were alſo reciprocally bound, in their reſpective gradations, to protect the poſſeſſions they had given. Thus the feodal connection was eſtabliſhed, a proper military ſubjection was naturally introduced, and an army of feudatories were always ready enliſted, and mutually prepared to muſter, not only in defence of each man's own ſeveral property, but alſo in defence of the whole, and of every part of this their newly acquired country (i): the prudence of which conſtitution was ſoon ſufficiently viſible in the ſtrength and ſpirit, with which they maintained their conqueſts.

The univerſality and early uſe of this feodal plan, among all thoſe nations which in complaiſance to the Romans we ſtill call barbarous, may appear from what is recorded (k) of the Cimbri and Teutones, nations of the ſame northern original as thoſe whom we have been deſcribing, at their firſt irruption into Italy about a century before the chriſtian æra. They demanded of the Romans, "*ut martius populus ali-*" *quid ſibi terrae daret, quaſi ſtipendium: caeterum, ut vellet,* "*manibus atque armis ſuis uteretur.*" The ſenſe of which may be thus rendered; they deſired ſtipendiary lands (that is, feuds) to be allowed them, to be held by military and other perſonal ſervices, whenever their lords ſhould call upon them. This was evidently the ſame conſtitution, that diſplayed itſelf more fully about ſeven hundred years afterwards, when the Salii, Burgundians, and Franks broke in upon Gaul,

(i) Wright. 8. (k) *L. Florus. l.* 3. *c.* 3.

the

the Viſigoths on Spain, and the Lombards upon Italy, and introduced with themſelves this northern plan of polity, ſerving at once to diſtribute, and to protect, the territories they had newly gained. And from hence it is probable that the emperor Alexander Severus (l) took the hint, of dividing lands conquered from the enemy among his generals and victorious ſoldiery, on condition of receiving military ſervice from them and their heirs for ever.

SCARCE had theſe northern conquerors eſtabliſhed themſelves in their new dominions, when the wiſdom of their conſtitutions, as well as their perſonal valour, alarmed all the princes of Europe; that is, of thoſe countries which had formerly been Roman provinces, but had revolted, or were deſerted by their old maſters, in the general wreck of the empire. Wherefore moſt, if not all, of them thought it neceſſary to enter into the ſame or a ſimilar plan of policy. For whereas, before, the poſſeſſions of their ſubjects were perfectly *allodial*; (that is, wholly independent, and held of no ſuperior at all) now they parcelled out their royal territories, or perſuaded their ſubjects to ſurrender up and retake their own landed property, under the like feodal obligation of military fealty (m). And thus, in the compaſs of a very few years, the feodal conſtitution, or the doctrine of tenure, extended itſelf over all the weſtern world. Which alteration of landed property, in ſo very material a point, neceſſarily drew after it an alteration of laws and cuſtoms: ſo that the feodal laws ſoon drove out the Roman, which had hitherto univerſally obtained, but now became for many centuries loſt and forgotten; and Italy itſelf (as ſome of the civilians, with more ſpleen than judgment, have expreſſed it) *belluinas, atque ferinas, immaneſque Longobardorum leges accepit* (n).

(l) "*Sola, quae de hoſtibus capta* "*ſunt, limitaneis ducibus et militibus* "*donavit; ita ut eorum ita eſſent, ſi* "*haeredes illorum militarent, nec un-* "*quam ad privatos pertinerent: di-* "*cens attentius illos militaturos, ſi eti-* "*am ſua rura defenderent. Addidit* "*ſane his et animalia et ſervos, ut poſ-* "*ſent colere quod acceperant; ne per* "*inopiam hominum vel per ſenectutem* "*deſererentur rura vicina barbariae,* "*quod turpiſſimum ille ducebat.*" (Æl. Lamprid. *in vita Alex. Severi.*)

(m) Wright. 10.

(n) *Grotius. Orig. l.* 1. §. 139.

BUT

BUT this feodal polity, which was thus by degrees eſtabliſhed over all the continent of Europe, ſeems not to have been received in this part of our iſland, at leaſt not univerſally and as a part of the national conſtitution, till the reign of William the Norman (o). Not but that it is reaſonable to believe, from abundant traces in our hiſtory and laws, that even in the times of the Saxons, who were a ſwarm from what ſir William Temple calls the ſame northern hive, ſomething ſimilar to this was in uſe: yet not ſo extenſively, nor attended with all the rigour that was afterwards imported by the Normans. For the Saxons were firmly ſettled in this iſland, at leaſt as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe (p).

THIS introduction however of the feodal tenures into England, by king William, does not ſeem to have been effected immediately after the conqueſt, nor by the mere arbitrary will and power of the conqueror; but to have been conſented to by the great council of the nation long after his title was eſtabliſhed. Indeed from the prodigious ſlaughter of the Engliſh nobility at the battle of Haſtings, and the fruitleſs inſurrections of thoſe who ſurvived, ſuch numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extenſive poſſeſſions: which gave a handle to the monkiſh hiſtorians, and ſuch as have implicitly followed them, to repreſent him as having by right of the ſword ſeiſed on all the lands of England, and dealt them out again to his own favourites. A ſuppoſition, grounded upon a miſtaken ſenſe of the word *conqueſt*; which, in its feodal acceptation, ſignifies no more than *acquiſition*: and this has led many haſty writers into a ſtrange hiſtorical miſtake, and one which upon the ſlighteſt examination will be found to be moſt untrue. However, certain it is, that the Normans now began to gain very large poſſeſſions in England: and their regard for the feodal law, under which they had long lived, together

(o) Spelm. *Gloſſ.* 218. Bract. *l.* 2. *c.* 16. §. 7. (p) Crag. *l.* 1. *t.* 4.

with

with the king's recommendation of this policy to the Engliſh, as the beſt way to put themſelves on a military footing, and thereby to prevent any future attempts from the continent, were probably the reaſons that prevailed to effect its eſtabliſhment here. And perhaps we may be able to aſcertain the time of this great revolution in our landed property with a tolerable degree of exactneſs. For we learn from the Saxon Chronicle (q), that in the nineteenth year of king William's reign an invaſion was apprehended from Denmark; and the military conſtitution of the Saxons being then laid aſide, and no other introduced in its ſtead, the kingdom was wholly defenceleſs: which occaſioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppreſſed the people. This apparent weakneſs, together with the grievances occaſioned by a foreign force, might co-operate with the king's remonſtrances, and the better incline the nobility to liſten to his propoſals for putting them in a poſture of defence. For, as ſoon as the danger was over, the king held a great council to enquire into the ſtate of the nation (r); the immediate conſequence of which was the compiling of the great ſurvey called domeſday-book, which was finiſhed in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders ſubmitted their lands to the yoke of military tenure, became the king's vaſals, and did homage and fealty to his perſon (s). This ſeems to have been the æra of formally introducing the feodal tenures by law; and probably the very law, thus made at the council of Sarum, is that which is ſtill extant (t), and couched in theſe remarkable words; "*ſtatui-*
"*mus, ut omnes liberi homines foedere et ſacramento affirment,*
"*quod intra et extra univerſum regnum Angliae Wilhelmo regi*
"*domino ſuo fideles eſſe velunt; terras et honores illius omni*

(q) *A. D.* 1085.

(r) *Rex tenuit magnum concilium, et graves ſermones habuit cum ſuis proceribus de hac terra, quo modo incoleretur, et a quibus hominibus. Chron. Sax. ibid.*

(s) *Omnes praedia tenentes, quotquot eſſent notae melioris per totam Angliam, ejus homines facti ſunt, et omnes ſe illi ſubdidere, ejuſque facti ſunt vaſalli, ac ei fidelitatis juramenta praeſtiterunt, ſe contra alios quoſcunque illi fidos futuros. Chron. Sax. A. D.* 1086.

(t) *cap.* 52. Wilk. 228.

"*fidelitate ubique ſervare cum eo, et contra inimicos et alieni-*
"*genas defendere.*" The terms of this law (as ſir Martin Wright has obſerved) (u) are plainly feodal: for, firſt, it requires the oath of fealty, which made in the ſenſe of the feudiſts every man that took it a tenant or vaſal; and, ſecondly, the tenants obliged themſelves to defend their lord's territories and titles againſt all enemies, foreign and domeſtic. But what puts the matter out of diſpute is another law of the ſame collection (v), which exacts the performance of the military feodal ſervices, as ordained by the general council. "*Omnes comites, et barones, et milites, et ſervientes, et*
"*univerſi liberi homines totius regni noſtri praedicti, habeant*
"*et teneant ſe ſemper bene in armis et in equis, ut decet et*
"*oportet: et ſint ſemper prompti et bene parati ad ſervitium*
"*ſuum integrum nobis explendum et peragendum cum opus fu-*
"*erit; ſecundum quod nobis debent de feodis et tenementis ſuis*
"*de jure facere; et ſicut illis ſtatuimus per commune concilium*
"*totius regni noſtri praedicti.*"

THIS new polity therefore ſeems not to have been *impoſed* by the conqueror, but nationally and freely *adopted* by the general aſſembly of the whole realm, in the ſame manner as other nations of Europe had before adopted it, upon the ſame principle of ſelf-ſecurity. And, in particular, they had the recent example of the French nation before their eyes; which had gradually ſurrendered up all its allodial or free lands into the king's hands, who reſtored them to the owners as a *beneficium* or feud, to be held to them and ſuch of their heirs as they previouſly nominated to the king: and thus by degrees all the allodial eſtates of France were converted into feuds, and the freemen became the vaſals of the crown (w). The only difference between this change of tenures in France, and that in England, was, that the former was effected gradually, by the conſent of private perſons; the latter was done at once, all over England, by the common conſent of the nation (x).

(u) Tenures. 66.
(v) *cap.* 58. Wilk. 228.
(w) Monteſq. Sp. L. b. 31. c. 8.
(x) Pharoah thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reſerving an annual render of the fifth part of their value. (Gen. c. 47.)

IN

IN conſequence of this change, it became a fundamental maxim and neceſſary principle (though in reality a mere fiction) of our Engliſh tenures, "that the king is the univer-"ſal lord and original proprietor of all the lands in his king-"dom (y): and that no man doth or can poſſeſs any part of "it, but what has mediately or immediately been derived as "a gift from him, to be held upon feodal ſervices." For, this being the real caſe in pure, original, proper feuds, other nations who adopted this ſyſtem were obliged to act upon the ſame ſuppoſition, as a ſubſtruction and foundation of their new polity, though the fact was indeed far otherwiſe. And indeed by thus conſenting to the introduction of feodal tenures, our Engliſh anceſtors probably meant no more than to put the kingdom in a ſtate of defence by eſtabliſhing a military ſyſtem; and to oblige themſelves (in reſpect of their lands) to maintain the king's title and territories, with equal vigour and fealty, *as if* they had received their lands from his bounty upon theſe expreſs conditions, as pure, proper, beneficiary feudatories. But, whatever their meaning was, the Norman interpreters, ſkilled in all the niceties of the feodal conſtitutions, and well underſtanding the import and extent of the feodal terms, gave a very different conſtruction to this proceeding; and thereupon took occaſion to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but alſo ſuch fruits and dependencies, ſuch hardſhips and ſervices, as were never known to other nations (z); as if the Engliſh had in fact, as well as theory, owed every thing they had to the bounty of their ſovereign lord.

OUR anceſtors therefore, who were by no means beneficiaries, but had barely conſented to this fiction of tenure from the crown, as the baſis of a military diſcipline, with reaſon looked upon theſe deductions as grievous impoſitions, and arbitrary concluſions from principles that, as to them, had no foundation in truth (a). However, this king, and his ſon William Rufus, kept up with a high hand all the

(y) *Tout fuit in luy, etirent de luy dl commencement. (M. 24. Edw. III. 65.)*

(z) Spelm. of feuds, c. 18.

(a) Wright. 81.

rigours of the feodal doctrines: but their ſucceſſor, Henry I, found it expedient, when he ſet up his pretenſions to the crown, to promiſe a reſtitution of the laws of king Edward the confeſſor, or antient Saxon ſyſtem; and accordingly, in the firſt year of his reign, granted a charter (b), whereby he gave up the greater grievances, but ſtill reſerved the fiction of feodal tenure, for the ſame military purpoſes which engaged his father to introduce it. But this charter was gradually broke through, and the former grievances were revived and aggravated, by himſelf and ſucceeding princes; till in the reign of king John they became ſo intolerable, that they occaſioned his barons, or principal feudatories, to riſe up in arms againſt him: which at length produced the famous great charter at Runing-mead, which, with ſome alterations, was confirmed by his ſon Henry III. And, though its immunities (eſpecially as altered on its laſt edition by his ſon) (c) are very greatly ſhort of thoſe granted by Henry I, it was juſtly eſteemed at the time a vaſt acquiſition to Engliſh liberty. Indeed, by the farther alteration of tenures that has ſince happened, many of theſe immunities may now appear, to a common obſerver, of much leſs conſequence than they really were when granted: but this, properly conſidered, will ſhew, not that the acquiſitions under John were ſmall, but that thoſe under Charles were greater. And from hence alſo ariſes another inference; that the liberties of Engliſhmen are not (as ſome arbitrary writers would repreſent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakneſs; but a reſtoration of that antient conſtitution, of which our anceſtors had been defrauded by the art and fineſſe of the Norman lawyers, rather than deprived by the force of the Norman arms.

HAVING given this ſhort hiſtory of their riſe and progreſs, we will next conſider the nature, doctrine, and principal laws of feuds; wherein we ſhall evidently trace the groundwork of many parts of our public polity, and alſo the original of ſuch

(b) *LL. Hen. I. c.* 1. (c) 9 *Hen. III.*

of

of our own tenures, as were either aboliſhed in the laſt century, or ſtill remain in force.

THE grand and fundamental maxim of all feodal tenure is this; that all lands were originally granted out by the ſovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord*; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the uſe and poſſeſſion, according to the terms of the grant, was ſtiled the feudatory or *vaſal*, which was only another name for the tenant or holder of the lands; though, on account of the prejudices we have juſtly conceived againſt the doctrines that were afterwards grafted on this ſyſtem, we now uſe the word *vaſal* opprobriouſly, as ſynonymous to ſlave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et conceſſi*; which are ſtill the operative words in our modern infeodations or deeds of feoffment. This was perfected by the ceremony of corporal inveſtiture, or open and notorious delivery of poſſeſſion in the preſence of the other vaſals, which perpetuated among them the aera of the new acquiſition, at a time when the art of writing was very little known: and therefore the evidence of property was repoſed in the memory of the neighbourhood; who, in caſe of a diſputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but alſo by the internal teſtimony of their own private knowlege.

BESIDES an oath of *fealty*, or profeſſion of faith to the lord, which was the parent of our oath of allegiance, the vaſal or tenant upon inveſtiture did uſually *homage* to his lord; openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between thoſe of the lord, who ſate before him; and there profeſſing that "he did become his "*man*, from that day forth, of life and limb and earthly "honour:" and then he received a kiſs from his lord (d).

(d) Litt. §. 85.

Which ceremony was denominated, *homagium*, or *manhood*, by the feudiſts, from the ſtated form of words, *devenio veſter homo* (e).

WHEN the tenant had thus profeſſed himſelf to be the man of his ſuperior or lord, the next conſideration was concerning the *ſervice*, which, as ſuch, he was bound to render, in recompenſe for the land he held. This, in pure, proper, and original feuds, was only twofold: to follow, or do *ſuit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when neceſſity called him to the field. The lord was, in early times, the legiſlator and judge over all his feudatories: and therefore the vaſals of the inferior lords were bound by their fealty to attend their domeſtic courts baron (f), (which were inſtituted in every manor or barony, for doing ſpeedy and effectual juſtice to all the tenants) in order as well to anſwer ſuch complaints as might be alleged againſt themſelves, as to form a jury or homage for the trial of their fellow-tenants; and upon this account, in all the feodal inſtitutions both here and on the continent, they are diſtinguiſhed by the appellation of the peers of the court; *pares curtis*, or *pares curiae*. In like manner the barons themſelves, or lords of inferior diſtricts, were denominated peers of the king's court, and were bound to attend him upon ſummons, to hear cauſes of greater conſequence in the king's preſence and under the direction of his grand juſticiary; till in many countries the power of that officer was broken and diſtributed into other courts of judicature, the peers of the king's court ſtill reſerving to themſelves (in almoſt every feodal government) the right of appeal from thoſe ſubordinate courts in the laſt reſort. The military branch of ſervice conſiſted in attending the lord to the wars, if called upon, with ſuch a retinue, and for ſuch a number of

(e) It was an obſervation of Dr. Arbuthnot, that tradition was no where preſerved ſo pure and incorrupt as among children, whoſe games and plays are delivered down invariably from one generation to another. Warburton's notes on Pope, vi. 134. 8vo. Perhaps it may be thought puerile to obſerve (in confirmation of this remark) that in one of our antient paſtimes (the *baſilinda* of Julius Pollux, *Onomaſtic.* l. 9. *c.* 7.) the ceremonies and language of feodal homage are preſerved with great exactneſs.

(f) *Feud. l.* 2. *t.* 55.

days,

days, as were ſtipulated at the firſt donation, in proportion to the quantity of the land.

AT the firſt introduction of feuds, as they were gratuitous, ſo alſo they were precarious and held at the *will* of the lord (g), who was the ſole judge whether his vaſal performed his ſervices faithfully. Then they became certain, for one or more *years*. Among the ancient Germans they continued only from year to year; an annual diſtribution of lands being made by their leaders in their general councils or aſſemblies (h). This was profeſſedly done, leſt their thoughts ſhould be diverted from war to agriculture; leſt the ſtrong ſhould incroach upon the poſſeſſions of the weak; and leſt luxury and avarice ſhould be encouraged by the erection of permanent houſes, and too curious an attention to convenience and the elegant ſuperfluities of life. But when the general migration was pretty well over, and a peaceable poſſeſſion of their new-acquired ſettlements had introduced new cuſtoms and manners; when the fertility of the ſoil had encouraged the ſtudy of huſbandry, and an affection for the ſpots they had cultivated began naturally to ariſe in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory (i). But ſtill feuds were not yet *hereditary*; though frequently granted, by the favour of the lord, to the children of the former poſſeſſor; till in proceſs of time it became unuſual, and was therefore thought hard, to reject the heir, if he were capable to perform the ſervices (k): and therefore infants, women, and profeſſed monks, who were incapable of bearing arms, were alſo incapable of ſucceeding to a genuine feud. But the heir, when admitted to the feud which his anceſtor poſſeſſed, uſed generally to pay a fine or acknowlegement to

(g) *Feud. l.* 1. *t.* 1.

(h) Thus Tacitus: *(de mor. Germ. c.* 26.) "*agri ab univerſis per vices* "*occupantur: arva per annos mutant.*" And Caeſar yet more fully; *(de bell. Gall. l.* 6. *c.* 21.) "*Neque quiſquam* "*agri modum certum, aut fines pro-* "*priis habet; ſed magiſtratus et* "*principes, in annos ſingulos, gentibus* "*et cognationibus hominum qui una co-* "*lerunt, quantum eis et quo loco viſum* "*eſt, attribuunt agri, atque anno poſt* "*alio tranſire cogunt.*"

(i) *Feud. l.* 1. *t.* 1.

(k) Wright. 14.

the lord, in horſes, arms, money, and the like, for ſuch renewal of the feud: which was called a relief, becauſe it reeſtabliſhed the inheritance, or, in the words of the feodal writers, "*incertam et caducam hereditatem relevabat*." This relief was afterwards, when feuds became abſolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceaſed.

FOR in proceſs of time feuds came by degrees to be univerſally extended, beyond the life of the firſt vaſal, to his *ſons*, or perhaps to ſuch one of them, as the lord ſhould name; and in this caſe the form of the donation was ſtrictly obſerved: for if a feud was given to a man and his *ſons*, all his ſons ſucceeded him in equal portions; and as they died off, their ſhared reverted to the lord, and did not deſcend to their children, or even to their ſurviving brothers, as not being ſpecified in the donation (l). But when ſuch a feud was given to a man, and his *heirs*, in general terms, then a more extended rule of ſucceſſion took place; and when a feudatory died, his male deſcendants *in infinitum* were admitted to the ſucceſſion. When any ſuch deſcendant, who thus had ſucceeded, died, his male deſcendants were alſo admitted in the firſt place; and, in defect of them, ſuch of his male collateral kindred as were of the blood or lineage of the firſt feudatory, but no others. For this was an unalterable maxim in feodal ſucceſſion, that "none was capable of inheriting a "feud, but ſuch as was of the blood of, that is, lineally de"ſcended from, the firſt feudatory (m)." And the deſcent, being thus confined to males, originally extended to all the males alike; all the ſons, without any diſtinction of primogeniture, ſucceeding to equal portions of the father's feud. But this being found upon many accounts inconvenient, (particularly, by dividing the ſervices, and thereby weakening the ſtrength of the feodal union) and *honorary* feuds (or titles of nobility) being now introduced, which were not of a diviſible nature, but could only be inherited by the eldeſt ſon (n); in imitation of theſe, *military* feuds (or thoſe we are now deſcribing) began alſo in moſt countries to de-

(l) Wright. 17. (m) Wright. 183. (n) *Feud.* 2. *t.* 55.

ſcend

ſcend according to the ſame rule of primogeniture, to the eldeſt ſon, in excluſion of all the reſt (o).

OTHER qualities of feuds were, that the feudatory could not aliene or diſpoſe of his feud; neither could he exchange, nor yet mortgage, nor even deviſe it by will, without the conſent of the lord (p). For, the reaſon of conferring the feud being the perſonal abilities of the feudatory to ſerve in war, it was not fit he ſhould be at liberty to transfer this gift, either from himſelf, or his poſterity, who were preſumed to inherit his valour, to others who might prove leſs able. And, as the feodal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and ſervice; therefore the lord could no more transfer his ſeignory or protection without conſent of his vaſal, than the vaſal could his feud without conſent of his lord (q): it being equally unreaſonable, that the lord ſhould extend his protection to a perſon to whom he had exceptions, and that the vaſal ſhould owe ſubjection to a ſuperior not of his own chooſing.

THESE were the principal, and very ſimple, qualities of the genuine or original feuds; being then all of a military nature, and in the hands of military perſons: though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, ſoon found it neceſſary to commit part of them to inferior tenants; obliging them to ſuch returns in ſervice, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without diſtraction: which returns, or *reditus*, were the original of rents. And by this means the feodal polity was greatly extended; theſe inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under ſimilar obligations of fealty, to do ſuit of court, to anſwer the ſtipulated renders or rent-ſervice, and to promote the welfare of their immediate ſuperiors or lords (r). But this at the ſame

(o) Wright. 32. (p) *Ibid.* 29. (q) *Ibid.* 30. (r) *Ibid.* 20.

time

time demoliſhed the antient ſimplicity of feuds; and an inroad being once made upon their conſtitution, it ſubjected them, in a courſe of time, to great varieties and innovations. Feuds came to be bought and ſold, and deviations were made from the old fundamental rules of tenure and ſucceſſion; which were held no longer ſacred, when the feuds themſelves no longer continued to be purely military. Hence theſe tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which diviſions were comprehended ſuch, and ſuch only, of which we have before ſpoken; and under that of improper or derivative feuds were comprized all ſuch as do not fall within the other deſcription: ſuch, for inſtance, as were originally bartered and ſold to the feudatory for a price; ſuch as were held upon baſe or leſs honourable ſervices, or upon a rent, in lieu of military ſervice; ſuch as were in themſelves alienable, without mutual licence; and ſuch as might deſcend indifferently either to males or females. But, where a difference was not expreſſed in the creation, ſuch new-created feuds did in all other reſpects follow the nature of an original, genuine, and proper feud (s).

BUT as ſoon as the feodal ſyſtem came to be conſidered in the light of a civil eſtabliſhment, rather than as a military plan, the ingenuity of the ſame ages, which perplexed all theology with the ſubtilty of ſcholaſtic diſquiſitions, and bewildered philoſophy in the mazes of metaphyſical jargon, began alſo to exert its influence on this copious and fruitful ſubject: in purſuance of which, the moſt refined and oppreſſive conſequences were drawn from what originally was a plan of ſimplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defence. From this one foundation, in different countries of Europe, very different ſuperſtructures have been raiſed: what effect it has produced on the landed property of England will appear in the following chapters.

(s) *Feud.* 2. *t.* 7.

CHAPTER

CHAPTER THE FIFTH.

OF THE ANTIENT ENGLISH TENURES.

IN this chapter we ſhall take a ſhort view of the antient tenures of our Engliſh eſtates, or the manner in which lands, tenements, and hereditaments might have been holden; as the ſame ſtood in force, till the middle of the laſt century. In which we ſhall eaſily perceive, that all the particularities, all the ſeeming and real hardſhips, that attended thoſe tenures, were to be accounted for upon feodal principles and no other; being fruits of, and deduced from, the feodal policy.

ALMOST all the real property of this kingdom is by the policy of our laws ſuppoſed to be granted by, dependent upon, and *holden* of ſome ſuperior or lord, by and in conſideration of certain ſervices to be rendered to the lord by the tenant or poſſeſſor of this property. The thing holden is therefore ſtiled a *tenement*, the poſſeſſors thereof *tenants*, and the manner of their poſſeſſion a *tenure*. Thus all the land in the kingdom is ſuppoſed to be holden, mediately or immediately, of the king; who is ſtiled the lord *paramount*, or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior perſons, became alſo lords with reſpect to thoſe inferior perſons, as they were ſtill tenants with reſpect to the king; and, thus partaking of a middle nature, were called *meſne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was ſaid to hold

of A, and A of the king; or, in other words, B held his lands immediately of A, but mediately of the king. The king therefore was ſtiled lord paramount; A was both tenant and lord, or was a meſne lord; and B was called tenant *paravail*, or the loweſt tenant; being he who is ſuppoſed to make avail, or profit, of the land (a). In this manner are all the lands of the kingdom holden, which are in the hands of ſubjects: for, according to ſir Edward Coke (b), in the law of England we have not properly *allodium*; which, we have ſeen (c), is the name by which the feudiſts abroad diſtinguiſh ſuch eſtates of the ſubject, as are not holden of any ſuperior. So that at the firſt glance we may obſerve, that our lands are either plainly feuds, or partake very ſtrongly of the feodal nature.

ALL tenures being thus derived, or ſuppoſed to be derived, from the king, thoſe that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the moſt honourable ſpecies of tenure, but at the ſame time ſubjected the tenants to greater and more burthenſome ſervices than inferior tenures did (d). This diſtinction ran through all the different ſorts of tenure; of which I now proceed to give an account.

I. THERE ſeem to have ſubſiſted among our anceſtors four principal ſpecies of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the ſeveral ſpecies or renders, that were due to the lords from their tenants. The ſervices, in reſpect to their quality, were either *free* or *baſe* ſervices; in reſpect to their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* ſervices were ſuch as were not unbecoming the character of a ſoldier, or a freeman, to perform; as to ſerve under

(a) 2 Inſt. 296.
(b) 1 Inſt. 1.
(c) pag. 47.
(d) In the Germanic conſtitution, the electors, the biſhops, the ſecular princes, the imperial cities, *&c.* which hold directly from the conqueror, are called the *immediate* ſtates of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hiſt. xlii. 61.

his

lord in the wars, to pay a ſum of money, and the like. *Baſe* ſervices were ſuch as were fit only for peaſants, or perſons of a ſervile rank; as to plough the lord's land, to make his hedges, to carry out his dung, or other mean employment. The *certain* ſervices, whether free or baſe, were ſuch as were ſtinted in quantity, and could not be exceeded on any pretence; as, to pay a ſtated annual rent, or to plough ſuch a field for three days. The *uncertain* depended upon unknown contingencies; as to do military ſervice in perſon, or pay an aſſeſſment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free ſervices: or to do whatever the lord ſhould command; which is a baſe or villein ſervice.

FROM the various combinations of theſe ſervices have ariſen the four kinds of lay tenure which ſubſiſted in England, till the middle of the laſt century; and three of which ſubſiſt to this day. Of theſe Bracton (who wrote under Henry the third) ſeems to give the cleareſt and moſt compendious account, of any author antient or modern (e); of which the following is the outline or abſtract (f) "Tene-"ments are of two kinds, *frank-tenement*, and *villenage*. "And, of frank-tenements, ſome are held freely in conſi-"deration of homage and *knight-ſervice*; others in *free-ſo-"cage* with the ſervice of fealty only." And again (g), "of villenages ſome are pure and others privileged. He "that holds in *pure villenage* ſhall do whatſoever is com-"manded him, and always be bound to an uncertain ſervice. "The other kind of villenage is called *villein-ſocage*; and "theſe villein-ſocmen do villein ſervices, but ſuch as are "certain and determined." Of which the ſenſe ſeems to be as follows: firſt, where the ſervice was *free*, but *uncertain*, as military ſervice with homage, that tenure was called

(e) *l. 4. tr. 1. c. 28.*

(f) *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et ſe vitio militari; aliud in libero ſocagio cum fidelitate tantum. §. 1.*

(g) *Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei praeceptum fuerit, et ſemper tenebitur ad incerta. Aliud genus villenagii dicitur villanum ſocagium; et hujuſmodi villani ſecmanni—villana faciunt ſervitia, ſed certa et determinata. §. 5.*

the

the tenure in chivalry, *per ſervitium militare*, or by knight-ſervice. Secondly, where the ſervice was not only *free*, but alſo *certain*, as by fealty only, by rent and fealty, *&c.* that tenure was called *liberum ſocagium*, or free ſocage. Theſe were the only *free* holdings or tenements; the others were *villenous*, or ſervile: as, thirdly, where the ſervice was *baſe* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, abſolute or pure villenage. Laſtly, where the ſervice was *baſe* in its nature, but reduced to a *certainty*, this was ſtill villenage, but diſtinguiſhed from the other by the name of privileged villenage, *villenagium privilegiatum*; or it might be ſtill called ſocage (from the *certainty* of its ſervices) but degraded by their *baſeneſs* into the inferior title of *villanum ſocagium*, villein-ſocage.

I. THE firſt, moſt univerſal, and eſteemed the moſt honourable ſpecies of tenure, was that by knight-ſervice, called in Latin *ſervitium militare*, and in law French *chivalry*, or *ſervice de chivaler*, anſwering to the *fief d' haubert* of the Normans (h), which name is expreſsly given it by the mirrour (i). This differed in very few points, as we ſhall preſently ſee, from a pure and proper feud, being entirely military, and the genuine effect of the feodal eſtabliſhment in England. To make a tenure by knight-ſervice, a determinate quantity of land was neceſſary, which was called a knight's fee, *feodum militare*; the value of which, not only in the reign of Edward II (k), but alſo of Henry II (l), and therefore probably at its original in the reign of the conqueror, was ſtated at 20 *l. per annum*; and a certain number of theſe knight's fees were requiſite to make up a barony. And he who held this proportion of land (or a whole fee) by knight-ſervice, was bound to attend his lord to the wars for forty days in every year, if called upon: which attendance was his *reditus* or return, his rent or ſervice, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and ſo in proportion (m). And there is reaſon to apprehend, that this ſer-

(h) Spelm. *Gloſſ.* 219.
(i) *c.* 2. §. 27.
(k) Stat. *de milit.* 1 Edw. II. Co. Litt. 69.
(l) Glanvil. *l.* 9. *c.* 4.
(m) Litt. §. 95.

vice

vice was the whole that our anceſtors meant to ſubject themſelves to; the other fruits and conſequences of this tenure being fraudulently ſuperinduced, as the regular (though unforeſeen) appendages of the feodal ſyſtem.

THIS tenure of knight-ſervice had all the marks of a ſtrict and regular feud: it was granted by words of pure donation, *dedi et conceſſi* (n); was transferred by inveſtiture or delivering corporal poſſeſſion of the land, uſually called livery of ſeiſin; and was perfected by homage and fealty. It alſo drew after it theſe ſeven fruits and conſequences, as inſeparably incident to the tenure in chivalry; *viz.* aids, relief, primer ſeiſin, wardſhip, marriage, fines for alienation, and eſcheat: all which I ſhall endeavour to explain, and ſhew to be of feodal original.

1. AIDS were originally mere benevolences granted by the tenant to his lord, in times of difficulty and diſtreſs (o); but in proceſs of time they grew to be conſidered as a matter of right, and not of diſcretion. Theſe aids were principally three: firſt, to ranſom the lord's perſon, if taken priſoner: a neceſſary conſequence of the feodal attachment and fidelity; inſomuch that the neglect of doing it, whenever it was in the vaſal's power, was, by the ſtrict rigour of the feodal law, an abſolute forfeiture of his eſtate (p). Secondly, to make the lord's eldeſt ſon a knight: a matter that was formerly attended with great ceremony, pomp, and expenſe. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms (q): the intention of it being to breed up the eldeſt ſon, and heir apparent of the ſeignory, to deeds of arms and chivalry, for the better defence of the nation. Thirdly, to marry the lord's eldeſt daughter, by giving her a ſuitable portion: for daughters' portions were in thoſe days extremely ſlender; few lords being able to ſave much out of their income for this pur-

(n) Co. Litt. 9.

(o) *Auxilia fiunt de gratia et non de jure, — cum dependeant ex gratia tenentium et non ad voluntatem dominorum.* Bracton. *l.* 2. *tr.* 1. *c.* 16. §. 8.

(p) *Feud. l.* 2. *t.* 24.

(q) Inſt. 233.

poſe;

poſe; nor could they acquire money by other means, being wholly converſant in matters of arms; nor, by the nature of their tenure, could they charge their lands with this, or any other incumbrances. From bearing their proportion to theſe aids no rank or profeſſion was exempted: and therefore even the monaſteries, till the time of their diſſolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female deſcendants (r). And one cannot but obſerve, in this particular, the great reſemblance which the lord and vaſal of the feodal law bore to the patron and client of the Roman republic; between whom alſo there ſubſiſted a mutual fealty, or engagement of defence and protection. With regard to the matter of aids, there were three which were uſually raiſed by the client; *viz.* to marry the patron's daughter; to pay his debts; and to redeem his perſon from captivity (s).

BUT beſides theſe antient feodal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts, (probably in imitation of the Romans) and aids to enable him to pay aids or reliefs to his ſuperior lord; from which laſt indeed the king's tenants *in capite* were, from the nature of their tenure, excuſed, as they held immediately of the king who had no ſuperior. To prevent this abuſe, king John's *magna charta* (t) ordained, that no aids be taken by the king without conſent of parliament, nor in any wiſe by inferior lords, ſave only the three antient ones abovementioned. But this proviſion was omitted in Henry III's charter, and the ſame oppreſſions were continued till the 25 Ed. I; when the ſtatute called *confirmatio chartarum* was enacted; which in this reſpect revived king John's charter, by ordaining that none but the antient aids ſhould be taken. But though the ſpecies of aids was thus reſtrained, yet the quantity

(r) Philips's life of Pole. I. 223.

(s) *Erat autem haec inter utroſque efficiorum viciſſitudo, — ut clientes ad collocandas ſenatorum filias de ſuo conferrent; in aeris alieni diſſolutionem gratuitam pecuniam erogarent; et ab hoſtibus in bello captos redimerent.* Paul. Manutius *de ſenatu Romano. c.* 1.

(t) *cap.* 12. 15.

of

of each aid remained arbitrary and uncertain. King John's charter indeed ordered, that all aids taken by inferior lords ſhould be reaſonable (u); and that the aids taken by the king of his tenants *in capite* ſhould be ſettled by parliament (w). But they were never completely aſcertained and adjuſted till the ſtatute Weſtm. 1. 3 Edw. I. c. 36. which fixed the aids of inferior lords at twenty ſhillings, or the ſuppoſed twentieth part of every knight's fee, for making the eldeſt ſon a knight, or marrying the eldeſt daughter; and the ſame was done with regard to the king's tenants *in capite* by ſtatute 25 Edw. III. c. 11. The other aid, for ranſom of the lord's perſon, being not in its nature capable of any certainty, was therefore never aſcertained.

2. RELIEF, *relevium*, was before mentioned as incident to every feodal tenure, by way of fine or compoſition with the lord for taking up the eſtate, which was lapſed or fallen in by the death of the laſt tenant. But, though reliefs had their original while feuds were only life-eſtates, yet they continued after feuds became hereditary; and were therefore looked upon, very juſtly, as one of the greateſt grievances of tenure: eſpecially when, at the firſt, they were merely arbitrary and at the will of the lord; ſo that, if he pleaſed to demand an exorbitant relief, it was in effect to diſinherit the heir (x). The Engliſh ill brooked this conſequence of their new adopted policy; and therefore William the conqueror by his laws (y) *aſcertained* the relief, by directing (in imitation of the Daniſh heriots) that a certain quantity of arms and habiliments of war ſhould be paid by the earls, barons, and vavaſours reſpectively; and, if the latter had no arms, they ſhould pay 100*s*. William Rufus broke through this compoſition, and again demanded arbitrary uncertain reliefs, as due by the feodal laws; thereby in effect obliging every heir to new-purchaſe or *redeem* his land (z): but his brother Henry I. by the charter before-mentioned reſtored his father's law; and ordained that the relief to be paid ſhould be according to

(u) *cap.* 15.
(w) *Ibid.* 14.
(x) Wright. 99.
(y) c. 22, 23, 24.
(z) 2 Roll. Abr. 514.

the law ſo eſtabliſhed, and not an arbitrary redemption (a). But afterwards, when, by an ordinance in 27 Hen. II. called the aſſiſe of arms, it was provided that every man's armour ſhould deſcend to his heir, for defence of the realm; and it thereby became impracticable to pay theſe acknowlegements in arms, according to the laws of the conqueror, the compoſition was univerſally accepted of 100*s.* for every knight's fee; as we find it ever after eſtabliſhed (b). But it muſt be remembered, that this relief was only then payable, if the heir at the death of his anceſtor had attained his full age of one and twenty years.

3. PRIMER *ſeiſin* was a feodal burthen, only incident to the king's tenants *in capite*, and not to thoſe who held of inferior or meſne lords. It was a right which the king had, when any of his tenants *in capite* died ſeiſed of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate poſſeſſion; and half a year's profits, if the lands were in reverſion expectant on an eſtate for life (c). This ſeems to be little more than an additional relief: but grounded upon this feodal reaſon; that, by the antient law of feuds, immediately upon the death of a vaſal the ſuperior was intitled to enter and take ſeiſin or poſſeſſion of the land, by way of protection againſt intruders, till the heir appeared to claim it, and receive inveſtiture: and, for the time the lord ſo held it, he was intitled to take the profits; and, unleſs the heir claimed within a year and day, it was by the ſtrict law a forfeiture (d). This practice however ſeems not to have long obtained in England, if ever, with regard to tenures under inferior lords: but, as to the king's tenures *in capite*, this *prima ſeiſina* was expreſsly declared, under Henry III and Edward II, to belong to the king by prerogative, in contradiſtinction to other lords (e). And the king was intitled to enter and receive the whole profits of the land, till livery was ſued; which ſuit being

(a) "*Haeres non redimet terram "ſuam, ſicut faciebat tempore fratris "mei, ſed legitima et juſta relevatione "relevabit eam.*" (*Text. Roffens, cap.* 34.)

(b) Glanv. *l.* 9. *c.* 4. Litt. §. 112.

(c) Co. Litt. 77.

(d) *Feud. l.* 2. *t.* 24.

(e) Stat. Marlbr. c. 16. 17. Edw. II. c. 3.

commonly

commonly within a year and day next after the death of the tenant, therefore the king uſed to take at an average the *firſt fruits*, that is to ſay, one year's profits of the land (f). And this afterwards gave a handle to the popes, who claimed to be feodal lords of the church, to claim in like manner from every clergyman in England the firſt year's profits of his benefice, by way of *primitiae*, or firſt fruits.

4. THESE payments were only due if the heir was of full age; but if he was under the age of twenty one, being a male, or fourteen being a female (g) the lord was intitled to the *wardſhip* of the heir, and was called the guardian in chivalry. This wardſhip conſiſted in having the cuſtody of the body and lands of ſuch heir, without any account of the profits, till the age of twenty one in males, and ſixteen in females. For the law ſuppoſed the heir-male unable to perform knight-ſervice till twenty-one; but as for the female, ſhe was ſuppoſed capable at fourteen to marry, and then her huſband might perform the ſervice. The lord therefore had no wardſhip, if at the death of the anceſtor the heir-male was of the full age of twenty-one, or the heir-female of fourteen: yet if ſhe was then under fourteen, and the lord once had her in ward, he might keep her ſo till ſixteen, by virtue of the ſtatute of Weſtm. 1. 3 Edw. 1. c. 22. the two additional years being given by the legiſlature for no other reaſon but merely to benefit the lord (h).

THIS wardſhip, ſo far as it related to land, though it was not nor could be part of the law of feuds, ſo long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did conſequently often deſcend upon infants, who by reaſon of their age could neither perform nor ſtipulate for the ſervices of the feud, does not ſeem upon feodal principles to have been unreaſonable. For the wardſhip of the land, or cuſtody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit perſon to

(f) Staundf. Prerog. 12.
(g) Litt. §. 103.
(h) *Ibid.*

ſupply the infant's ſervices, till he ſhould be of age to perform them himſelf. And, if we conſider a feud in its original import, as a ſtipend, fee, or reward for actual ſervice, it could not be thought hard that the lord ſhould with-hold the ſtipend, ſo long as the ſervice was ſuſpended. Though undoubtedly to our Engliſh anceſtors, where ſuch ſtipendiary donation was a mere ſuppoſition or figment, it carried abundance of hardſhip; and accordingly it was relieved by the charter of Henry I. before-mentioned, which took this cuſtody from the lord, and ordained that the cuſtody, both of the land and the children, ſhould belong to the widow or next of kin. But this noble immunity did not continue many years.

THE wardſhip of the body was a conſequence of the wardſhip of the land; for he who enjoyed the infant's eſtate was the propereſt perſon to educate and maintain him in his infancy: and alſo, in a political view, the lord was moſt concerned to give his tenant a ſuitable education, in order to qualify him the better to perform thoſe ſervices which in his maturity he was bound to render.

WHEN the male heir arrived to the age of twenty one, or the heir-female to that of ſixteen, they might ſue out their livery or *ouſterlemain* (i); that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this ſeems expreſsly contrary to *magna charta* (k). However, in conſideration of their lands having been ſo long in ward, they were excuſed all reliefs, and the king's tenants alſo all primer ſeiſins (l). In order to aſcertain the profits that aroſe to the crown, by theſe fruits of tenures, and to grant the heir his livery, the itinerant juſtices, or juſtices in eyre, had it formerly in charge to make inquiſition concerning them by a jury of the county (m), commonly called an *inquiſitio poſt mortem*; which was inſtituted to enquire (at the death of any man of fortune) the value of his eſtate, the tenure by which

(i) Co. Litt. 77.
(k) 9 Hen. III. c. 3.
(l) Co. Litt. 77.
(m) Hoveden. *ſub Ric. I.*

it

it was holden, and who, and of what age, his heir was; thereby to aſcertain the relief and value of the primer ſeiſin, or the wardſhip and livery accruing to the king thereupon. A manner of proceeding that came in proceſs of time to be greatly abuſed, and at length an intolerable grievance; it being one of the principal accuſations againſt Empſon and Dudley, the wicked engines of Henry VII, that by colour of falſe inquiſitions, they compelled many perſons to ſue out livery from the crown, who by no means were tenants thereunto (n). And, afterwards a court of wards and liveries was erected (o), for conducting the ſame enquiries in a more ſolemn and legal manner.

WHEN the heir thus came of full age, provided he held a knight's fee, he was to receive the order of knighthood, and was compellable to take it upon him, or elſe pay a fine to the king. For, in thoſe heroical times, no perſon was qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparations and ſolemnity. We may plainly diſcover the foot-ſteps of a ſimilar cuſtom in what Tacitus relates of the Germans, who in order to qualify their young men to bear arms, preſented them in a full aſſembly with a ſhield and lance; which ceremony, as was formerly hinted (p) is ſuppoſed to have been the original of the feodal knighthood (q). This prerogative, of compelling the vaſals to be knighted, or to pay a fine, was expreſsly recognized in parliament, by the ſtatute *de militibus*, 1 Edw. II; was exerted as an expedient of raiſing money by many of our beſt princes, particularly by Edward VI. and queen Elizabeth; but yet was the occaſion of heavy murmurs when exerted by Charles I: among whoſe many misfortunes it was, that neither himſelf nor his people ſeemed able to diſtinguiſh between the arbitrary ſtretch, and the legal exertion, of prerogative. However, among the

(n) 4 Inſt. 198.
(o) Stat. 32 Hen. VIII. c. 46.
(p) Vol. I. pag. 392.
(q) "*In ipſo concilio vel principum* "*aliquis, vel pater, vel propinquus,* "*ſcuto frameaque juvenem ornant.* "*Haec apud illos toga, hic primus ju-* "*ventae honos: ante hoc domus pars* "*videntur; mox reipublicae.*" *De mor. Germ. cap.* 13.

other conceſſions made by that unhappy prince, before the fatal recourſe to arms, he agreed to diveſt himſelf of this undoubted flower of his crown, and it was accordingly aboliſhed by ſtatute 16 Car. I. c. 20.

5. BUT, before they came of age, there was ſtill another piece of authority, which the guardian was at liberty to exerciſe over his infant wards; I mean the right of *marriage*, (*maritagium*, as contradiſtinguiſhed from *matrimonium*) which in its feodal ſenſe ſignifies the power, which the lord or guardian in chivalry had of diſpoſing of his infant ward in matrimony. For while the infant was in ward, the guardian had the power of tendering him or her a ſuitable match, without *diſparagement*, or inequality: which if the infants refuſed, they forfeited the value of the marriage, *valorem maritagii*, to their guardian (r); that is, ſo much as a jury would aſſeſs, or any one would *bona fide* give to the guardian for ſuch an alliance (s): and, if the infants married themſelves without the guardian's conſent, they forfeited double the value, *duplicem valorem maritagii* (t). This ſeems to have been one of the greateſt hardſhips of our antient tenures. There are indeed ſubſtantial reaſons why the lord ſhould have the *reſtraint* and *controll* of the ward's marriage, eſpecially of his female ward; becauſe of their tender years and the danger of ſuch female wards intermarrying with the lord's enemy (u). But no tolerable pretence could be aſſigned why the lord ſhould have the *ſale*, or *value*, of the marriage. Nor indeed is this claim of ſtrictly feodal original; the moſt probable account of it ſeeming to be this: that by the cuſtom of Normandy the lord's conſent was neceſſary to the marriage of his *female*-wards (w); which was introduced into England, together with the reſt of the Norman doctrine of feuds: and it is likely that the lords uſually took money for ſuch their conſent, ſince in the often-cited charter of Henry the firſt, he engages for the future to take nothing for *his* conſent; which alſo he promiſes in general to give, provided ſuch

(r) Litt. §. 110.
(s) Stat. Mert. c. 6. Co. Litt. 82.
(t) Litt. §. 110.
(u) Bract. l. 2. c. 37. §. 6.
(w) Gr. Cuſt. 55.

female

female ward were not married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary unequal manner, it was provided by king John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract (x); or, as it was expressed in the first draught of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua* (y). But these clauses in behalf of the relations were omitted in the charter of Henry III; wherein (z) the clause stands merely thus, "*haeredes* "*maritentur absque disparagatione*;" meaning certainly, by *haeredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage of heirs male; and as Glanvil (a) expressly confines it to heirs female. But the king and his great lords thenceforward took a handle from the ambiguity of this expression to claim them both, *sive sit masculus sive foemina*, as Bracton more than once expresses it (b); and also, as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could (c). And afterwards this right, of selling the ward in marriage, or else receiving the price or value of it, was expressly declared by the statute of Merton; (d) which is the first direct mention of it that I have met with, in our own or in any other law.

6. ANOTHER attendant or consequence of tenure by knight-service was that of *fines* due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. This depended on the nature of the feodal connexion; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the feodal obligation was considered as reciprocal, the lord also

(x) *cap.* 6. *edit. Oxon.*
(y) *cap.* 3. *ibid.*
(z) *cap.* 6.
(a) *l.* 9. *c.* 9. & 12. & *l.* 9. *c.* 4.
(b) *l.* 2. *c.* 38. §. 1.
(c) Wright. 97.
(d) 20 Hen. III. c. 6.

could

could not alienate his ſeignory without the conſent of his tenant, which conſent of his was called an *attornment*. This reſtraint upon the lords ſoon wore away; that upon the tenants continued longer. For, when every thing came in proceſs of time to be bought and ſold, the lords would not grant a licence to their tenants to aliene, without a fine being paid; apprehending that, if it was reaſonable for the heir to pay a fine or relief on the renovation of his paternal eſtate, it was much more reaſonable that a ſtranger ſhould make the ſame acknowlegement on his admiſſion to a newly purchaſed feud. With us in England, theſe fines ſeem only to have been exacted from the king's tenants *in capite*, who were never able to aliene without a licence: but, as to common perſons, they were at liberty, by *magna carta* (e), and the ſtatute of *quia emptores* (f), (if not earlier) to aliene the whole of their eſtate, to be holden of the ſame lord, as they themſelves held it of before. But the king's tenants *in capite*, not being included under the general words of theſe ſtatutes, could not aliene without a licence: for if they did, it was in antient ſtrictneſs an abſolute forfeiture of the lands (g); though ſome have imagined otherwiſe. But this ſeverity was mitigated by the ſtatute 1 Edw. III. c. 12. which ordained, that in ſuch caſe the lands ſhould not be forfeited, but a reaſonable fine be paid to the king. Upon which ſtatute it was ſettled, that one third of the yearly value ſhould be paid for a licence of alienation; but, if the tenant preſumed to aliene without a licence, a full year's value ſhould be paid (h).

7. THE laſt conſequence of tenure in chivalry was eſcheat; which is the determination of the tenure, or diſſolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and ſtained by commiſſion of treaſon or felony; whereby every inheritable quality was intirely blotted out and aboliſhed. In ſuch

(e) *cap.* 32.
(f) 18 Edw. I. c. 1.
(g) 2. Inſt. 66.
(h) *Ibid.* 67.

caſes

caſes the land eſcheated, or fell back, to the lord of the fee (i); that is, the tenure was determined by breach of the original condition, expreſſed or implied in the feodal donation. In the one caſe, there were no heirs ſubſiſting of the blood of the firſt feudatory or purchaſer, to which heirs alone the grant of the feud extended: in the other, the tenant, by perpetrating an atrocious crime, ſhewed that he was no longer to be truſted as a vaſal, having forgotten his duty as a ſubject; and therefore forfeited his feud, which he held under the implied condition that he ſhould not be a traitor or a felon. The conſequence of which in both caſes was, that the gift, being determined, reſulted back to the lord who gave it (k).

THESE were the principal qualities, fruits, and conſequences of the tenure by knight-ſervice: a tenure, by which the greateſt part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the laſt century; and which was created, as ſir Edward Coke expreſsly teſtifies (l), for a military purpoſe; *viz.* for defence of the realm by the king's own principal ſubjects, which was judged to be much better than to truſt to hirelings or foreigners. The deſcription here given is that of knight-ſervice proper; which was to attend the king in his wars. There were alſo ſome other ſpecies of knight-ſervice; ſo called, though improperly, becauſe the ſervice or render was of a free and honourable nature, and equally uncertain as to the time of rendering as that of knight-ſervice proper, and becauſe they were attended with ſimilar fruits and conſequences. Such was the tenure by *grand ſerjeanty*, *per magnum ſervitium*, whereby the tenant was bound, inſtead of ſerving the king *generally* in his wars, to do ſome ſpecial honorary ſervice to the king in perſon; as to carry his banner, his ſword, or the like; or to be his butler, champion, or other officer at his coronation (m). It was in moſt other reſpects like knight-ſervice (n); only he was

(i) Co. Litt. 13.
(k) *Feud. l.* 2. *t.* 86.
(l) Inſt. 192.
(m) Litt. §. 153.
(n) *Ibid.* §. 158.

not

not bound to pay aid (o), or eſcuage (p); and, when tenant by knight-ſervice paid five pounds for a relief on every knight's fee, tenant by grand ſerjeanty paid one year's value of his land, were it much or little (q). Tenure by *cornage*, which was, to wind a horn when the Scots or other enemies entered the land, in order to warn the king's ſubjects, was (like other ſervices of the ſame nature) a ſpecies of grand ſerjeanty (r).

THESE ſervices, both of chivalry and grand ſerjeanty, were all perſonal, and uncertain as to their quantity or duration. But, the perſonal attendance in knight-ſervice growing troubleſome and inconvenient in many reſpects, the tenants found means of compounding for it; by firſt ſending others in their ſtead, and in proceſs of time making a pecuniary ſatisfaction to the lords in lieu of it. This pecuniary ſatisfaction at laſt came to be levied by aſſeſſments, at ſo much for every knight's fee; and therefore this kind of tenure was called *ſcutagium* in Latin, or *ſervitium ſcuti*; *ſcutum*, being then a well-known denomination of money: and, in like manner it was called, in our Norman French, *eſcuage*; being indeed a pecuniary, inſtead of a military, ſervice. The firſt time this appears to have been taken was in the 5 Hen. II. on account of his expedition to Toulouſe; but it ſoon came to be ſo univerſal, that perſonal attendance fell quite into diſuſe. Hence we find in our antient hiſtories that, from this period, when our kings went to war, they levied ſcutages on their tenants, that is, on all the landholders of the kingdom, to defray their expences, and to hire troops: and theſe aſſeſſments, in the time of Henry II, ſeem to have been made arbitrarily and at the king's pleaſure. Which prerogative being greatly abuſed by his ſucceſſors, it became matter of national clamour; and king John was obliged to conſent, by his *magna carta*, that no ſcutage ſhould be impoſed without conſent of parliament (s). But this clauſe was omitted in his ſon Henry III's charter; where we only find (t),

(o) 2 Inſt. 253.
(p) Litt. §. 158.
(q) Litt. §. 154.
(r) *Ibid.* §. 156.

(s) *Nullum ſcutagium ponatur in regno noſtro, niſi per commune conſilium regni noſtri. cap.* 12.
(t) *cap.* 37.

that

that ſcutages or eſcuage ſhould be taken as they were uſed to be taken in the time of Henry II; that is, in a reaſonable and moderate manner. Yet afterwards by ſtatute 25 Edw. I. c. 5 & 6. and many ſubſequent ſtatutes (u) it was enacted, that the king ſhould take no aids or taſks but by the common aſſent of the realm. Hence it is held in our old books, that eſcuage or ſcutage could not be levied but by conſent of parliament (w); ſuch ſcutages being indeed the groundwork of all ſucceeding ſubſidies, and the land-tax of later times.

SINCE therefore eſcuage differed from knight-ſervice in nothing, but as a compenſation differs from actual ſervice, knight-ſervice is frequently confounded with it. And thus Littleton (x) muſt be underſtood, when he tells us, that tenant by homage, fealty, and eſcuage was tenant by knight-ſervice: that is, that this tenure (being ſubſervient to the military policy of the nation) was reſpected (y) as a tenure in chivalry (z). But as the actual ſervice was uncertain, and depended upon emergencies, ſo it was neceſſary that this pecuniary compenſation ſhould be equally uncertain, and depend on the aſſeſſments of the legiſlature ſuited to thoſe emergencies. For had the eſcuage been a ſettled invariable ſum, payable at certain times, it had been neither more nor leſs than a mere pecuniary rent; and the tenure, inſtead of knight-ſervice, would have then been of another kind, called ſocage (a), of which we ſhall ſpeak in the next chapter.

FOR the preſent, I have only to obſerve, that by the degenerating of knight-ſervice, or perſonal military duty, into eſcuage, or pecuniary aſſeſſments, all the advantages, (either promiſed or real) of the feodal conſtitution were deſtroyed, and nothing but the hardſhips remained. Inſtead of forming a national militia, compoſed of barons, knights, and gentlemen, bound by their intereſt, their honour, and their oaths,

(u) See Vol. I. pag. 136.
(w) Old Ten. *tit. Eſcuage.*
(x) §. 103.
(y) Wright. 122.
(z) *Pro feodo militari reputatur.* Flet. *l.* 2. *c.* 14. §. 7.
(a) Litt. §. 97, 120.

to

to defend their king and country, the whole of this ſyſtem of tenures now tended to nothing elſe, but a wretched means of raiſing money to pay an army of occaſional mercenaries. In the mean time the families of all our nobility and gentry groaned under the intolerable burthens, which (in conſequence of the fiction adopted after the conqueſt) were introduced and laid upon them by the ſubtlety and fineſſe of the Norman lawyers. For, beſides the ſcutages they were liable to in defect of perſonal attendance, which however were aſſeſſed by themſelves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldeſt ſon was to be knighted, or his eldeſt daughter married; not to forget the ranſom of his own perſon. The heir, on the death of his anceſtor, if of full age, was plundered of the firſt emoluments ariſing from his inheritance, by way of *relief* and *primer ſeiſin*; and, if under age, of the whole of his eſtate during infancy. And then, as Sir Thomas Smith (b) very feelingly complains, "when he came to his "own, after he was out of *wardſhip*, his woods decayed, "houſes fallen down, ſtock waſted and gone, lands let "forth and ploughed to be barren," to make amends he was yet to pay half a year's profits as a fine for ſuing out his *livery*; and alſo the price or value of his *marriage*, if he refuſed ſuch wife as his lord and guardian had bartered for, and impoſed upon him; or twice that value, if he married another woman. Add to this, the untimely and expenſive honour of *knighthood*, to make his poverty more completely ſplendid. And when by theſe deductions his fortune was ſo ſhattered and ruined, that perhaps he was obliged to ſell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *licence* of *alienation*.

A SLAVERY ſo complicated, and ſo extenſive as this, called aloud for a remedy in a nation that boaſted of her freedom. Palliatives were from time to time applied by ſucceſſive acts of parliament, which aſſuaged ſome temporary grievances. Till at length the humanity of king James I. conſented (c) for a proper equivalent to aboliſh them all;

(b) Commonw. l. 3. c. 5. (c) 4 Inſt. 202.

though

though the plan then proceeded not to effect: in like manner as he had formed a ſcheme, and began to put it in execution, for removing the feodal grievance of heretable juriſdictions in Scotland (d), which has ſince been purſued and effected by the ſtatute 20 Geo. II. c. 43. (e). King James's plan for exchanging our military tenures ſeems to have been nearly the ſame as that which has been ſince purſued; only with this difference, that, by way of compenſation for the loſs which the crown and other lords would ſuſtain, an annual fee-farm rent ſhould be ſettled and inſeparably annexed to the crown, and aſſured to the inferior lords, payable out of every knight's fee within their reſpective ſeignories. An expedient, ſeemingly much better than the hereditary exciſe, which was afterwards made the principal equivalent for theſe conceſſions. For at length the military tenures, with all their heavy appendages, were deſtroyed at one blow by the ſtatute 12 Car. II. c. 24. which enacts, "that the court "of wards and liveries, and all wardſhips, liveries, primer "ſeiſins, and ouſterlemains, values and forfeitures of mar-"riages, by reaſon of any tenure of the king of others, be "totally taken away. And that all fines for alienations, "tenures by homage, knights-ſervice, and eſcuage, and alſo "aids for marrying the daughter or knighting the ſon, and "all tenures of the king *in capite*, be likewiſe taken away. "And that all ſorts of tenures, held of the king or others, be "turned into free and common ſocage; ſave only tenures in "frankalmoign, copyholds, and the honorary ſervices (with-"out the ſlaviſh part) of grand ſerjeanty." A ſtatute, which was a greater acquiſition to the civil property of this kingdom than even *magna carta* itſelf: ſince that only pruned the luxuriances that had grown out of the military tenures, and thereby preſerved them in vigour; but the ſtatute of king Charles extirpated the whole, and demoliſhed both root and branches.

(d) Dalrymp. of feuds, 292.

(e) By another ſtatute of the ſame year (20 Geo. II. c. 50.) the tenure of *wardholding* (equivalent to the knight-ſervice of England) is for ever aboliſhed in Scotland.

CHAPTER

CHAPTER THE SIXTH.

OF THE MODERN ENGLISH TENURES.

ALTHOUGH, by the means that were mentioned in the preceding chapter, the oppreſſive or military part of the feodal conſtitution was happily done away, yet we are not to imagine that the conſtitution itſelf was utterly laid aſide, and a new one introduced in its room; ſince by the ſtatute 12 Car. II. the tenures of ſocage and frankalmoign, the honorary ſervices of grand ſerjeanty, and the tenure by copy of court roll were reſerved; nay all tenures in general, except frankalmoign, grand ſerjeanty, and copyhold, were reduced to one general ſpecies of tenure, then well known and ſubſiſting, called free and common ſocage. And this, being ſprung from the ſame feodal original as the reſt, demonſtrates the neceſſity of fully contemplating that antient ſyſtem; ſince it is that alone, to which we can recur to explain any ſeeming, or real, difficulties, that may ariſe in our preſent mode of tenure.

THE military tenure, or that by knight-ſervice, conſiſted of what were reputed the moſt free and honourable ſervices; but which in their nature were unavoidably uncertain in reſpect to the time of their performance. The ſecond ſpecies of tenure, or *free-ſocage*, conſiſted alſo of free and honourable ſervices; but ſuch as were liquidated and reduced to an abſolute certainty. And this tenure not only ſubſiſts to this day, but has in a manner abſorbed and ſwallowed up (ſince the

the ſtatute of Charles the ſecond) almoſt every other ſpecies of tenure. And to this we are next to proceed.

II. SOCAGE, in its moſt general and extenſive ſignification, ſeems to denote a tenure by any certain and determinate ſervice. And in this ſenſe it is by our antient writers conſtantly put in oppoſition to chivalry, or knight-ſervice, where the render was precarious and uncertain. Thus Bracton (a); if a man holds by a rent in money, without any eſcuage or ſerjeanty, "*id tenementum dici poteſt ſocagium:*" but if you add thereto any royal ſervice, or eſcuage to any, the ſmalleſt, amount, "*illud dici poterit feodum militare.*" So too the author of Fleta (b); "*ex donationibus ſervitia mi-*"*litaria vel magnae ſerjantiae non continentibus, oritur nobis*"*quoddam nomen generale, quod eſt ſocagium.*" Littleton alſo (c) defines it to be, where the tenant holds his tenement of the lord by any *certain* ſervice, in lieu of all other ſervices; ſo that they be not ſervices of chivalry, or knight-ſervice. And therefore afterwards (d) he tells us, that whatſoever is not tenure in chivalry is tenure in ſocage: in like manner as it is defined by Finch (e), a tenure to be done out of war. The ſervice muſt therefore be certain, in order to denominate it ſocage; as to hold by fealty, and 20*s.* rent; or, by homage, fealty, and 20*s.* rent; or, by homage and fealty without rent; or, by fealty and certain corporal ſervice, as ploughing the lord's land for three days; or, by fealty only without any other ſervice: for all theſe are tenures in ſocage (f).

BUT ſocage, as we hinted in the laſt chapter, is of two ſorts: *free*-ſocage, where the ſervices are not only certain, but honourable; and *villein*-ſocage, where the ſervices, though certain, are of a baſer nature. Such as hold by the former tenure are called in Glanvil (g), and other ſubſequent authors, by the name of *liberi ſokemanni*, or tenants in free-ſocage. Of this tenure we are firſt to ſpeak; and this, both

(a) *l.* 2. *c.* 16. § 9.
(b) *l.* 3. *c.* 14. §. 9.
(c) §. 117.
(d) §. 118.
(e) L. 147.
(f) Litt. §. 117, 118, 119.
(g) *l.* 3. *c.* 7.

in

in the nature of its ſervice, and the fruits and conſequences appertaining thereto, was always by much the moſt free and independent ſpecies of any. And therefore I cannot but aſſent to Mr Somner's etymology of the word (h); who derives it from the Saxon appellation, *ſoc*, which ſignifies liberty or privilege, and, being joined to a uſual termination, is called *ſocage*, in Latin *ſocagium*; ſignifying thereby a free or privileged tenure (i). This etymology ſeems to be much more juſt than that of our common lawyers in general, who derive it from *foca*, an old Latin word denoting (as they tell us) a plough: for that in antient time this ſocage tenure conſiſted in nothing elſe but ſervices of huſbandry, which the tenant was bound to do to his lord, as to plough, ſow, or reap for him; but that, in proceſs of time, this ſervice was changed into an annual rent by conſent of all parties, and that, in memory of its original, it ſtill retains the name of ſocage or plough-ſervice (k). But this by no means agrees with what Littleton himſelf tells us (l), that to hold by fealty only, without paying any rent, is tenure in ſocage; for here is plainly no commutation for plough-ſervice. Beſides, even ſervices, confeſſedly of a military nature and original, (as eſcuage itſelf, which while it remained uncertain was equivalent to knight-ſervice) the inſtant they were reduced to a certainty changed both their name and nature, and were called ſocage (m). It was the certainty therefore that denominated it a ſocage tenure; and nothing ſure could be a greater liberty or privilege, than to have the ſervice aſcertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore alſo Britton, who deſcribes ſocage tenure under the name of *fraunke ferme* (n), tells us, that they are "lands and tene-"ments, whereof the nature of the fee is changed by feoff-"ment *out of chivalry* for *certain* yearly ſervices, and in reſpect "whereof neither homage, ward, marriage, nor relief can be "demanded." Which leads us alſo to another obſervation,

(h) Gavelk. 138.

(i) In like manner Skene in his expoſition of the Scots' law, title *ſocage*, tells us that it is "ane kind of holding "of lands, quhen ony man is infeft "*freely*, &c.

(k) Litt. §. 119.

(l) §. 118.

(m) Litt. §. 98. 120.

(n) c. 66.

that,

that, if ſocage tenures were of ſuch baſe and ſervile original, it is hard to account for the very great immunities which the tenants of them always enjoyed; ſo highly ſuperior to thoſe of the tenants by chivalry, that it was thought, in the reigns of both Edward I. and Charles II, a point of the utmoſt importance and value to the tenants, to reduce the tenure by knight-ſervice to *fraunke ferme* or tenure by ſocage. We may therefore, I think, fairly conclude in favour of Somner's etymology, and the liberal extraction of the tenure in free ſocage, againſt the authority even of Littleton himſelf.

TAKING this then to be the meaning of the word, it ſeems probable that the ſocage tenures were the relics of Saxon liberty, retained by ſuch perſons, as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honourable, as it was called, but at the ſame time more burthenſome, tenure of knight-ſervice. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a ſpecies of ſocage tenure (o); the preſervation whereof inviolate from the innovations of the Norman conqueror is a fact univerſally known. And thoſe who thus preſerved their liberties were ſaid to hold in *free* and *common* ſocage.

As therefore the grand criterion and diſtinguiſhing mark of this ſpecies of tenure are the having its renders or ſervices aſcertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit ſerjeanty*, tenure in *burgage*, and *gavelkind*.

WE may remember, that by the ſtatute 12 Car. II. grand ſerjeanty is not itſelf totally aboliſhed, but only the ſlaviſh appendages belonging to it; for the honorary ſervices (ſuch as carrying the king's ſword or banner, officiating as his butler, carver, &c. at the coronation) are ſtill reſerved. Now *petit ſerjeanty* bears a great reſemblance to grand ſerjeanty; for as the one is a perſonal ſervice, ſo the other is a rent or render,

(o) Wright. 211.

both tending to ſome purpoſe relative to the king's perſon. Petit ſerjeanty, as defined by Littleton (p), conſiſts in holding lands of the king by the ſervice of rendering to him annually ſome ſmall implement of war, as a bow, a ſword, a lance, an arrow, or the like. This, he ſays (q), is but ſocage in effect; for it is no perſonal ſervice, but a certain rent: and, we may add, it is clearly no predial ſervice, or ſervice of the plough, but in all reſpects *liberum et commune focagium*: only, being held of the king, it is by way of eminence dignified with the title of *parvum ſervitium regis*, or petit ſerjeanty. And *magna carta* reſpects it in this light, when it enacts (r), that no wardſhip of the lands or body ſhall be claimed by the king in virtue of a tenure by petit ſerjeanty.

TENURE in *burgage* is deſcribed by Glanvil (s), and is expreſsly ſaid by Littleton (t) to be but tenure in ſocage; and it is where the king or other perſon is lord of an antient borough, in which the tenements are held by a rent certain (u). It is indeed only a kind of town ſocage; as common ſocage, by which other lands are holden, is uſually of a rural nature. A borough, as we have formerly ſeen, is diſtinguiſhed from other towns by the right of ſending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage therefore, or burgage tenure, is where houſes, or lands which were formerly the ſcite of houſes, in an antient borough, are held of ſome lord in common ſocage, by a certain eſtabliſhed rent. And theſe ſeem to have withſtood the ſhock of the Norman encroachments principally on account of their inſignificancy, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would ſcarce have amounted to a knight's fee. Beſides, the owners of them, being chiefly artificers and perſons engaged in trade, could not with any tolerable propriety be put on ſuch a military eſtabliſhment

(p) §. 159.
(q) §. 160.
(r) *cap.* 27.
(s) *lib.* 7. *cap.* 3.
(t) §. 162.
(u) Litt. §. 162, 163.

as

as the tenure in chivalry was. And here alſo we have again an inſtance, where a tenure is confeſſedly in ſocage, and yet could not poſſibly have ever been held by plough-ſervice; ſince the tenants muſt have been citizens or burghers, the ſituation frequently a walled town, the tenement a ſingle houſe; ſo that none of the owners was probably maſter of a plough, or was able to uſe one, if he had it. The free ſocage therefore in which theſe tenements are held, ſeems to be plainly a remnant of Saxon liberty; which may alſo account for the great variety of cuſtoms, affecting theſe tenements ſo held in antient burgage: the principal and moſt remarkable of which is that called *Borough-Engliſh*, ſo named in contradiſtinction as it were to the Norman cuſtoms, and which is taken notice of by Glanvil (w) and by Littleton (x), *viz.* that the youngeſt ſon, and not the eldeſt, ſucceeds to the burgage tenement on the death of his father. For which Littleton (y) gives this reaſon; becauſe the youngeſt ſon by reaſon of his tender age, is not ſo capable as the reſt of his brethren to help himſelf. Our authors (z) have indeed given a much ſtranger reaſon for this cuſtom, as if the lord of the fee had antiently a right to break the ſeventh commandment with his tenant's wife on her wedding-night: and that therefore this tenement deſcended not to the eldeſt, but the youngeſt, ſon; who was more certainly the offspring of the tenant. But I cannot learn that ever this cuſtom prevailed in England, though it certainly did in Scotland, (under the name of *mercheta* or *marcheta*) till aboliſhed by Malcolm III (a). And perhaps a more rational account than either may be fetched (though at a ſufficient diſtance) from the practice of the Tartars; among whom, according to father Duhalde, this cuſtom of deſcent to the youngeſt ſon alſo prevails. That nation is compoſed totally of ſhepherds and herdſmen; and the elder ſons, as ſoon as they are capable of leading a paſtoral life, migrate from their father with a certain allotment of cattle; and go to ſeek a new habitation. The youngeſt ſon therefore,

(w) *ubi ſupra.*
(x) §. 165.
(y) §. 211.
(z) 3 Mod. Pref.
(a) Seld. tit. of hon. 2, 1. 47. *Reg. Mag.* l. 4. c. 31.

who continues lateſt with the father, is naturally the heir of his houſe, the reſt being already provided for. And thus we find that, among many other northern nations, it was the cuſtom for all the ſons but one to migrate from the father, which one became his heir (b). So that poſſibly this cuſtom, wherever it prevails, may be the remnant of that paſtoral ſtate of our Britiſh and German anceſtors, which Cæſar and Tacitus deſcribe. Other ſpecial cuſtoms there are in burgage tenures: as that the wife ſhall be endowed of *all* her huſband's tenements (c), and not of the third part only, as at the common law: and that a man might diſpoſe of his tenements by will (d), which, in general, was not permitted after the conqueſt till the reign of Henry the eighth; though in the Saxon times it was allowable (e). A pregnant proof that theſe liberties of ſocage tenure were fragments of Saxon liberty.

The nature of the tenure in *gavelkind* affords us a ſtill ſtronger argument. It is univerſally known what ſtruggles the Kentiſhmen made to preſerve their antient liberties; and with how much ſucceſs thoſe ſtruggles were attended. And as it is principally here that we meet with the cuſtom of gavelkind, though it was and is to be found in ſome other parts of the kingdom (f), we may fairly conclude that this was a part of thoſe liberties; agreeably to Mr. Selden's opinion, that gavelkind before the Norman conqueſt was the general cuſtom of the realm (g). The diſtinguiſhing properties of this tenure are various: ſome of the principal are theſe: 1. The tenant is of age ſufficient to alienate his eſtate by feoffment at the age of fifteen (h). 2. The eſtate does not eſcheat in caſe of an attainder and execution for felony; their maxim being, "the father to the bough, the ſon to the plough (i)." 3. In

(b) *Pater cunctos filios adultos a ſe pellebat, præter unum quem heredem ſui juris relinquebat. (Walſingh. Upodigm. Neuſtr. c. 1.)*
(c) Litt. §. 166.
(d) §. 167.
(e) Wright. 172.
(f) Stat. 32 Hen. VIII. c. 29. Kitch. of courts, 200.
(g) *In toto regno, ante ducis adventum, frequens et uſitata fuit: poſtea cæteris adempta, ſed privatis quorundam locorum conſuetudinibus alibi poſtea regerminans: Cantianis ſolum integra et inviolata remanſit. Analect. l. 2. c. 7.)*
(h) Lamb Peramb. 614.
(i) Lamb. 634.

moſt

moſt places he had a power of deviſing lands by will, before the ſtatute for that purpoſe was made (k). 4. The lands deſcend, not to the eldeſt, youngeſt, or any one ſon only, but to all the ſons together (l); which was indeed antiently the moſt uſual courſe of deſcent all over England (m), though in particular places particular cuſtoms prevailed. Theſe, among other properties, diſtinguiſhed this tenure in a moſt remarkable manner: and yet it is held to be only a ſpecies of a ſocage tenure, modified by the cuſtom of the country; being holden by ſuit of court and fealty, which is a ſervice in its nature certain (n). Wherefore, by a charter of king John (o), Hubert archbiſhop of Canterbury was authorized to *exchange* the gavelkind tenures holden of the ſee of Canterbury into tenures by knight-ſervice; and by ſtatute 31 Hen. VIII. c. 3. for diſgavelling the lands of divers lords and gentlemen in the county of Kent, they are directed to be deſcendible for the future *like other lands, which were never holden by ſervice of ſocage*. Now the immunities which the tenants in gavelkind enjoyed were ſuch, as we cannot conceive ſhould be conferred upon mere ploughmen or peaſants: from all which I think it ſufficiently clear, that tenures in free ſocage, are in general of a nobler original than is aſſigned by Littleton, and after him by the bulk of our common lawyers.

HAVING thus diſtributed and diſtinguiſhed the ſeveral ſpecies of tenure in free ſocage, I proceed next to ſhew that this alſo partakes very ſtrongly of the feodal nature. Which may probably ariſe from its antient Saxon original; ſince (as was before obſerved) (p) feuds were not unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into ſuch arbitrary conſequences as among the Normans. It ſeems therefore reaſonable to imagine, that ſocage tenure exiſted in much the ſame ſtate before the conqueſt as after; that in Kent it was preſerved with a high hand, as our hiſtories inform us it was; and that the reſt

(k) F. N. B. 198. Cro. Car. 561.
(l) Litt. §. 210.
(m) Glanv *l.* 7. *c.* 3.
(n) Wright. 211.
(o) Spelm. *cod. vet. leg.* 355.
(p) pag. 48.

the ſocage tenures diſperſed through England eſcaped the general fate of other property, partly out of favour and affection to their particular owners, and partly from their own inſignificancy; ſince I do not apprehend the number of ſocage tenures ſoon after the conqueſt to have been very conſiderable, nor their value by any means large; till by ſucceſſive charters of enfranchiſement granted to the tenants, which are particularly mentioned by Britton (q) their number and value began to ſwell ſo far, as to make a diſtinct, and juſtly envied, part of our Engliſh ſyſtem of tenures.

HOWEVER this may be, the tokens of their feodal original will evidently appear from a ſhort compariſon of the incidents and conſequences of ſocage tenure with thoſe of tenure in chivalry; remarking their agreement or difference as we go along.

1. IN the firſt place, then, both were held of ſuperior lords; of the king as lord paramount, and ſometimes of a ſubject or meſne lord between the king and the tenant.

2. BOTH were ſubject to the feodal return, render, rent, or ſervice of ſome ſort or other, which aroſe from a ſuppoſition of an original grant from the lord to the tenant. In the military tenure, or more proper feud, this was from its nature uncertain; in ſocage, which was a feud of the improper kind, it was certain, fixed, and determinate, (though perhaps nothing more than bare fealty) and ſo continues to this day.

3. BOTH were, from their conſtitution, univerſally ſubject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant (r). Which oath of fealty uſually draws after it ſuit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court baron; if it be only for the reaſon given by Littleton (s), that if it be ne-

(q) c. 66.
(r) Litt. §. 117. 131.
(s) §. 130.

gleƈted,

glected, it will by long continuance of time grow out of memory (as doubtleſs it frequently has) whether the land be holden of the lord or not; and ſo he may loſe his ſeignory, and the profit which may accrue to him by eſcheats and other contingencies (t).

4. THE tenure in ſocage was ſubject, of common right, to aids for knighting the ſon and marrying the eldeſt daughter (u): which were fixed by the ſtatute Weſtm. 1. c. 36. at 20 *s.* for every 20 *l. per annum* ſo held; as in knight-ſervice. Theſe aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all aboliſhed by the ſtatute 12 Car. II.

5. RELIEF is due upon ſocage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5 *l.* or one quarter of the ſuppoſed value of the land; but a ſocage relief is one year's rent or render, payable to the tenant by the lord, be the ſame either great or ſmall (w): and therefore Bracton (x) will not allow this to be properly a relief, but *quaedam praeſtatio loco relevii in recognitionem domini.* So too the ſtatute 28 Edw. I. c. 1. declares, that a free ſokeman ſhall give *no relief*, but ſhall double his rent after the death of his anceſtor, according to that which he hath uſed to pay his lord, and ſhall not be grieved above meaſure. Reliefs in knight-ſervice were only payable, if the heir at the death of his anceſtor was of full age: but in ſocage they were due, even though the heir was under age, becauſe the lord has no wardſhip over him (y). The ſtatute of Charles II. reſerves the reliefs incident to ſocage tenures; and therefore, wherever lands in fee ſimple are holden by a rent, relief is ſtill due of common right upon the death of the tenant (z).

(t) *Eo maxime praeſtandum eſt, ne dubium reddatur jus domini et vetuſtate temporis obſcuretur. (Corvin. jus feud. l. 2. t. 7.*

(u) Co. Litt. 91.

(w) Litt. §. 126.

(x) *l. 2. c. 37. §. 8.*

(y) Litt. §. 127.

(z) 3 Lev. 145.

6. PRIMER ſeiſin was incident to the king's ſocage tenants *in capite*, as well as thoſe by knight ſervice (a). But tenancy *in capite* as well as primer ſeiſins, are alſo, among the other feodal burthens, intirely aboliſhed by the ſtatute.

7. WARDSHIP is alſo incident to a tenure in ſocage; but of a nature very different from that incident to knight-ſervice. For if the inheritance deſcend to an infant under fourteen, the wardſhip of him ſhall not belong to the lord of the fee; becauſe, in this tenure, no military or other perſonal ſervice being required, there is no occaſion for the lord to take the profits, in order to provide a proper ſubſtitute for his infant tenant: but his neareſt relation (to whom the inheritance cannot deſcend) ſhall be his guardian in ſocage, and have the cuſtody of his land and body till he arrives at the age of fourteen. The guardian muſt be ſuch a one, to whom the inheritance by no poſſibility can deſcend; as was fully explained, together with the reaſons for it, in the former book of theſe commentaries (b). At fourteen this wardſhip in ſocage ceaſes, and the heir may ouſt the guardian, and call him to account for the rents and profits (c): for at this age the law ſuppoſes him capable of chuſing a guardian for himſelf. It was in this particular, of wardſhip, as alſo in that of marriage, and in the certainty of the render or ſervice, that the ſocage tenures had ſo much the advantage of the military ones. But as the wardſhip ceaſed at fourteen, there was this diſadvantage attending it; that young heirs, being left at ſo tender an age to chuſe their own guardians till twenty-one, they might make an improvident choice. Therefore, when almoſt all the lands of the kingdom were turned into ſocage tenures, the ſame ſtatute 12 Car. II. c. 24. enacted, that it ſhould be in the power of any father by will to appoint a guardian, till his child ſhould attain the age of twenty one. And, if no ſuch appointment be made, the court of chancery will frequently interpoſe, to prevent an infant heir from improvidently expoſing himſelf to ruin.

(a) Co. Litt. 77.
(b) page 449.
(c) Litt. §. 123. Co. Litt. 89.

8. MAR-

8. MARRIAGE, or the *valor maritagii*, was not in ſocage tenure any perquiſite or advantage to the guardian, but rather the reverſe. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unleſs he married him to advantage (d). For the law, in favour of infants, is always jealous of guardians, and therefore in this caſe it made them account, not only for what they *did*, but alſo for what they *might*, receive on the infant's behalf; leſt by ſome colluſion the guardian ſhould have received the value, and not brought it to account: but, the ſtatute having deſtroyed all values of marriages, this doctrine of courſe hath ceaſed with them. At fourteen years of age the ward might have diſpoſed of himſelf in marriage, without any conſent of his guardian, till the late act for preventing clandeſtine marriages. Theſe doctrines of wardſhip and marriage in ſocage tenure were ſo diametrically oppoſite to thoſe in knight-ſervice, and ſo entirely agree with thoſe parts of king Edward's laws, that were reſtored by Henry the firſt's charter, as might alone convince us that a ſocage was of a higher original than the Norman conqueſt.

9. FINES for alienations were, I apprehend, due for lands holden of the king *in capite*, by ſocage tenure, as well as in caſe of tenure by knight ſervice: for the ſtatutes that relate to this point, and ſir Edward Coke's comment on them (e), ſpeak generally of all tenants *in capite*, without making any diſtinction; though now all fines for alienation are demoliſhed by the ſtatute of Charles the ſecond.

10. ESCHEATS are equally incident to tenure in ſocage, as they were to tenure by knight-ſervice; except only in gavelkind lands, which are (as is before mentioned) ſubject to no eſcheats for felony, though they are to eſcheats for want of heirs (f).

(d) Litt §. 123.
(e) 1 Inſt. 43. 2 Inſt. 65, 66, 67.
(f) Wright. 210.

THUS

THUS much for the two grand ſpecies of tenure, under which almoſt all the free lands of the kingdom were holden till the reſtoration in 1660, when the former was aboliſhed and ſunk into the latter: ſo that lands of both ſorts are now holden by the one univerſal tenure of free and common ſocage.

THE other grand diviſion of tenure mentioned by Bracton as cited in the preceding chapter, is that of *villenage*, as contradiſtinguiſhed from *liberum tenementum*, or frank tenure. And this (we may remember) he ſubdivides into two claſſes, *pure*, and *privileged*, villenage: from whence have ariſen two other ſpecies of our modern tenures.

III. FROM the tenure of pure villenage have ſprung our preſent *copyhold* tenures, or tenure by copy of court roll at the will of the lord; in order to obtain a clear idea of which, it will be previouſly neceſſary to take a ſhort view of the original and nature of manors.

MANORS are in ſubſtance as antient as the Saxon conſtitution, though perhaps differing a little, in ſome immaterial circumſtances from thoſe that exiſt at this day (g): juſt as we obſerved of feuds, that they were partly known to our anceſtors, even before the Norman conqueſt. A manor, *manerium*, *a manendo*, becauſe the uſual reſidence of the owner, ſeems to have been a diſtrict of ground, held by lords or great perſonages; who kept in their own hands ſo much land as was neceſſary for the uſe of their families, which were called *terrae dominicales*, or *demeſne* lands; being occupied by the lord or *dominus manerii*, and his ſervants. The other *tenemental* lands they diſtributed among their tenants; which from the different modes of tenure were called and diſtinguiſhed by two different names. Firſt, *book-land*, or charter-land, which was held by deed under certain rents and free ſervices, and in effect differed nothing from free ſocage lands (h): and from hence have ariſen all

(g) Co. Cop. §. 2, & 10. (h) Co. Cop. §. 3.

the

the freehold tenants which hold of particular manors, and owe ſuit and ſervice to the ſame. The other ſpecies was called *folk-land* which was held by no aſſurance in writing, but diſtributed among the common folk or people at the pleaſure of the lord, and reſumed at his diſcretion; being indeed land held in villenage, which we ſhall preſently deſcribe more at large. The reſidue of the manor being uncultivated, was termed the lord's waſte, and ſerved for public roads, and for common of paſture to the lord and his tenants. Manors were formerly called baronies, as they ſtill are lordſhips; and each lord or baron was empowered to hold a domeſtic court, called the court-baron, for redreſſing miſdemeſnors and nuſances within the manor, and for ſettling diſputes of property among the tenants. This court is an inſeparable ingredient of every manor; and if the number of ſuitors ſhould ſo fail, as not to leave ſufficient to make a jury or homage, that is, two tenants at the leaſt, the manor itſelf is loſt.

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THUS much for the two grand ſpecies of tenure, under which almoſt all the free lands of the kingdom were holden till the reſtoration in 1660, when the former was aboliſhed and ſunk into the latter: ſo that lands of both ſorts are now holden by the one univerſal tenure of free and common ſocage.

THE other grand diviſion of tenure mentioned by Bracton as cited in the preceding chapter, is that of *villenage*, as contradiſtinguiſhed from *liberum tenementum*, or frank tenure. And this (we may remember) he ſubdivides into two claſſes, *pure*, and *privileged*, villenage: from whence have ariſen two other ſpecies of our modern tenures.

III. FROM the tenure of pure villenage have ſprung our preſent *copyhold* tenures, or tenure by copy of court roll at the will of the lord; in order to obtain a clear idea of which, it will be previouſly neceſſary to take a ſhort view of the original and nature of manors.

MANORS are in ſubſtance as antient as the Saxon conſtitution, though perhaps differing a little, in ſome immaterial circumſtances from thoſe that exiſt at this day (g): juſt as we obſerved of feuds, that they were partly known to our anceſtors, even before the Norman conqueſt. A manor, *manerium*, *a manendo*, becauſe the uſual reſidence of the owner, ſeems to have been a diſtrict of ground, held by lords or great perſonages; who kept in their own hands ſo much land as was neceſſary for the uſe of their families, which were called *terrae dominicales*, or *demeſne* lands; being occupied by the lord or *dominus manerii*, and his ſervants. The other *tenemental* lands they diſtributed among their tenants; which from the different modes of tenure were called and diſtinguiſhed by two different names. Firſt, *book-land*, or charter-land, which was held by deed under certain rents and free ſervices, and in effect differed nothing from free ſocage lands (h): and from hence have ariſen all

(g) Co. Cop. §. 2, & 10. (h) Co. Cop. §. 3.

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immediate feoffor, but of the chief lord of the fee, of whom ſuch feoffor himſelf held it. And from hence it is held, that all manors exiſting at this day, muſt have exiſted by immemorial preſcription; or at leaſt ever ſince the 18 Edw. I. when the ſtatute of *quia emptores* was made. For no new manor can have been created ſince that ſtatute; becauſe it is eſſential to a manor, that there be tenants who hold of the lord, and that ſtatute enacts, that for the future no ſubject ſhall create any new tenants to hold of himſelf.

Now with regard to the folk-land, or eſtates held in villenage, this was a ſpecies of tenure neither ſtrictly feodal, Norman, or Saxon; but mixed and compounded of them all (i): and which alſo, on account of the heriots that uſually attend it, may ſeem to have ſomewhat Daniſh in its compoſition. Under the Saxon government there were, as ſir William Temple ſpeaks (k), a ſort of people in a condition of downright ſervitude, uſed and employed in the moſt ſervile works, and belonging, both they, their children, and effects, to the lord of the ſoil, like the reſt of the cattle or ſtock upon it. Theſe ſeem to have been thoſe who held what was called the folk-land, from which they were removeable at the lord's pleaſure. On the arrival of the Normans here, it ſeems not improbable, that they, who were ſtrangers to any other than a feodal ſtate, might give ſome ſparks of enfranchiſement to ſuch wretched perſons as fell to their ſhare, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raiſed the tenant to a kind of eſtate ſuperior to downright ſlavery, but inferior to every other condition (l). This they called villenage, and the tenants villeins, either from the word *villis*, or elſe, as Sir Edward Coke tells us (m), *a villa*; becauſe they lived chiefly in villages, and were employed in ruſtic works of the moſt ſordid kind: like the Spartan *helotes*, to whom alone the culture of the lands was conſigned; their rugged maſters, like our northern anceſtors, eſteeming war the only honourable employment of mankind.

(i) Wright. 215.
(k) Introd. Hiſt. Eng. 59.
(l) Wright. 217.
(m) 1 Inſt. 116.

THESE

THESE villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land; or elſe they were *in groſs*, or at large, that is, annexed to the perſon of the lord, and transferable by deed from one owner to another (n). They could not leave their lord without his permiſſion; but, if they ran away, or were purloined from him, might be claimed and recovered by action, like beaſts or other chattels. They held indeed ſmall portions of land by way of ſuſtaining themſelves and families; but it was at the mere will of the lord, who might diſpoſſeſs them whenever he pleaſed; and it was upon villein ſervices, that is, to carry out dung, to hedge and ditch the lord's demeſnes, and any other the meaneſt offices (o): and theſe ſervices were not only baſe, but uncertain both as to their time and quantity (p). A villein, in ſhort, was in much the ſame ſtate with us, as lord Moleſworth (q) deſcribes to be that of the boors in Denmark, and Stiernhook (r) attributes alſo to the *traals* or ſlaves in Sweden; which confirms the probability of their being in ſome degree monuments of the Daniſh tyranny. A villein could acquire no property either in lands or goods; but, if he purchaſed either, the lord might enter upon them, ouſt the villein, and ſeize them to his own uſe, unleſs he contrived to diſpoſe of them again before the lord had ſeiſed them; for the lord had then loſt his opportunity (s).

IN many places alſo a fine was payable to the lord if the villein preſumed to marry his daughter to any one without leave from the lord (t); and, by the common law, the lord might alſo bring an action againſt the huſband for damages in thus purloining his property (u). For the children of villeins were alſo in the ſame ſtate of bondage with their pa-

(n) Litt. §. 181.
(o) *Ibid.* §. 172.
(p) *Ille qui tenet in villenagio faciet quicquid ei praeceptum fuerit, nec ſcire debet ſero quid facere debet in craſtino, et ſemper tenebitur ad incerta.* (Bracton, *l.* 4. *tr.* 1. c. 28.)
(q) c. 8.
(r) *de jure Sueonum. l.* 2. *c.* 4.
(s) Litt. §. 177.
(t) Co. Litt. 140.
(u) Litt. §. 202.

rents;

rents; whence they were called in Latin, *nativi*, which gave riſe to the female appellation of a villein, who was called a *neiſe* (w). In caſe of a marriage between a freeman and a neiſe, or a villein and a freewoman, the iſſue followed the condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus ſequitur ventrem*. But no baſtard could be born a villein, becauſe by another maxim of our law he is *nullius filius:* and as he can *gain* nothing by inheritance, it were hard that he ſhould *loſe* his natural freedom by it (x). The law however protected the perſons of villeins, as the king's ſubject, againſt atrocious injuries of the lord: for he might not kill, or maim his villein (y); though he might beat him with impunity, ſince the villein had no action or remedy at law againſt his lord, but in caſe of the murder of his anceſtor or the maim of his own perſon. Neiſes indeed had alſo an appeal of rape, in caſe the lord violated them by force (z).

VILLEINS might be enfranchiſed by manumiſſion, which is either expreſs or implied; expreſs; as where a man granted to the villein a deed of manumiſſion (a): implied; as where a man bound himſelf in a bond to his villein for a ſum of money, granted him an annuity by deed, or gave him an eſtate in fee, for life, or years (b): for this was dealing with his villein on the footing of a freeman: it was in ſome of the inſtances giving him an action againſt his lord, or in others veſting an ownerſhip in him entirely inconſiſtent with his former ſtate of bondage. So alſo if the lord brought an action againſt his villein, this enfranchiſed him (c); for, as the lord might have a ſhort remedy againſt his villein, by ſeizing his goods, (which was more than equivalent to any damages he could recover) the law, which is always ready to catch at any thing in favour of liberty, preſumed that by bringing this action he meant to ſet his villein on the ſame

(w) Litt. §. 187.
(x) *Ibid.* §. 187, 188.
(y) *Ibid.* §. 189, 194.
(z) *Ibid.* §. 190.
(a) *Ibid.* §. 204.
(b) §. 204, 5, 6.
(c) §. 208.

footing

footing with himſelf, and therefore held it an implied manumiſſion. But, in caſe the lord indicted him for felony, it was otherwiſe; for the lord could not inflict a capital puniſhment on his villein, without calling in the aſſiſtance of the law.

VILLEINS, by this and many other means, in proceſs of time gained conſiderable ground on their lords; and in particular ſtrengthened the tenure of their eſtates to that degree, that they came to have in them an intereſt in many places full as good, in others better than their lords. For the goodnature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their poſſeſſions without interruption, in a regular courſe of deſcent, the common law, of which cuſtom is the life, now gave them title to preſcribe againſt their lords; and, on performance of the ſame ſervices, to hold their lands, in ſpight of any determination of the lord's will. For, though, in general they are ſtill ſaid to hold their eſtates at the will of the lord, yet it is ſuch a will as is agreeable to the cuſtom of the manor; which cuſtoms are preſerved and evidenced by the rolls of the ſeveral courts baron in which they are entered or kept on foot by the conſtant immemorial uſage of the ſeveral manors in which the lands lie. And, as ſuch tenants had nothing to ſhew for their eſtates but theſe cuſtoms, and admiſſions in purſuance of them, entered on thoſe rolls, or the copies of ſuch entries witneſſed by the ſteward, they now began to be called *tenants by copy of court roll*, and their tenure itſelf a *copyhold* (d).

THUS copyhold tenures, as ſir Edward Coke obſerves (e), although very meanly deſcended, yet come of an antient houſe; for, from what has been premiſed it appears, that copyholders are in truth no other but villeins, who, by a long ſeries of immemorial encroachments on the lord, have at laſt eſtabliſhed a cuſtomary right to thoſe eſtates, which before were held abſolutely at the lord's will. Which affords a very ſubſtantial reaſon for the great variety of cuſtoms

(d) F. N. B. 12. (e) Cop. §. 32.

that

that prevail in different manors, with regard both to the deſcent of the eſtates, and the privileges belonging to the tenants. And theſe encroachments grew to be ſo univerſal, that when tenure in villenage was virtually aboliſhed, (though copyholds were reſerved) by the ſtatute of Charles II, there was hardly a pure villein left in the nation. For ſir Thomas Smith (f) teſtifies, that in all his time (and he was ſecretary to Edward VI) he never knew any villein in groſs throughout the realm; and the few villeins regardant that were then remaining, were ſuch only as had belonged to biſhops, monaſteries, or other eccleſiaſtical corporations, in the preceding times of popery. For he tells us, that "the holy fathers, monks, and friars, had in their confeſſions, and ſpecially in their extreme and deadly ſickneſs, convinced the laity how dangerous a practice it was, for one chriſtian man to hold another in bondage: ſo that temporal men, by little and little, by reaſon of that terror in their conſciences, were glad to manumit all their villeins. But the ſaid holy fathers, with the abbots and priors, did not in like ſort by theirs; for they alſo had a ſcruple in conſcience to impoveriſh and deſpoil the church ſo much, as to manumit ſuch as were bond to their churches, or to the manors which the church had gotten; and ſo kept their villeins ſtill." By theſe ſeveral means the generality of villeins in the kingdom have long ago ſprouted up into copyholders: their perſons being enfranchiſed by manumiſſion or long acquieſcence; but their eſtates, in ſtrictneſs, remaining ſubject to the ſame ſervile conditions and forfeitures as before; though, in general, the villein ſervices are uſually commuted for a ſmall pecuniary quit-rent (g).

(f) Commonwealth. b. 3. c. 10.

(g) In ſome manors the copyholders were bound to perform the moſt ſervile offices, as to hedge and ditch the lord's grounds, to lop his trees, to reap his corn, and the like; the lord uſually finding them meat and drink, and ſometimes (as is ſtill the uſe in the highlands of Scotland) a minſtrel or piper for their diverſion. (*Rot. Maner. de Edgware Com. Midd.*) As in the kingdom of Whidah, on the ſlave coaſt of Africa, the people are bound to cut and carry in the king's corn from off his demeſne lands, and are attended by muſic during all the time of their labour. (Mod. Un. Hiſt. xvi. 429.)

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As a farther conſequence of what has been premiſed, we may collect theſe two main principles, which are held (h) to be the ſupporters of a copyhold tenure, and without which it cannot exiſt; 1. That the lands be parcel of, and ſituate within, that manor, under which it is held. 2. That they have been demiſed, or demiſable, by copy of court roll immemorially. For immemorial cuſtom is the life of all tenures by copy; ſo that no new copyhold can, ſtrictly ſpeaking, be granted at this day.

IN ſome manors, where the cuſtom hath been to permit the heir to ſucceed the anceſtor in his tenure, the eſtates are ſtiled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only: for the cuſtom of the manor has in both caſes ſo far ſuperſeded the will of the lord, that, provided the ſervices be performed or ſtipulated for by fealty, he cannot, in the firſt inſtance, refuſe to admit the heir of his tenant upon his death; nor, in the ſecond, can he remove his preſent tenant ſo long as he lives, though he holds nominally by the precarious tenure of his lord's will.

THE fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, ſervices (as well in rents as otherwiſe) reliefs, and eſcheats. The two latter belong only to copyholds of inheritance; the former to thoſe for life only. But, beſides theſe, copyholds have alſo heriots, wardſhip, and fines. Heriots, which I think are agreed to be a Daniſh cuſtom, and of which we ſhall ſay more hereafter, are a render of the beſt beaſt or other good (as the cuſtom may be) to the lord on the death of the tenant. This is plainly a relick of villein tenure; there being originally leſs hardſhip in it, when all the goods and chattels belonged to the lord, and he might have ſeiſed them even in the villein's lifetime. Theſe are incident to both ſpecies of copyhold; but wardſhip and fines to thoſe of inheritance only.

(h) Co. Litt. 58.

Wardſhip, in copyhold eſtates, partakes both of that in chivalry and that in ſocage. Like that in chivalry, the lord is the legal guardian, who uſually aſſigns ſome relation of the infant tenant to act in his ſtead: and he, like guardian in ſocage, is accountable to his ward for the profits. Of fines, ſome are in the nature of primer ſeiſins, due on the death of each tenant, others are mere fines for alienation of the lands; in ſome manors only one of theſe ſorts can be demanded, in ſome both, and in others neither. They are ſometimes arbitrary and at the will of the lord, ſometimes fixed by cuſtom: but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reaſonable* in their extent; otherwiſe they might amount to a diſheriſon of the eſtate. No fine therefore is allowed to be taken upon deſcents and alienations, (unleſs in particular circumſtances) of more than two years improved value of the eſtate (i). From this inheritance we may judge of the favourable diſpoſition, that the law of England (which is a law of liberty) hath always ſhewn to this ſpecies of tenants; by removing, as far as poſſible, every real badge of ſlavery from them, however ſome nominal ones may continue. It ſuffered cuſtom very early to get the better of the expreſs terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the cuſtom of the manor: and, where no cuſtom has been ſuffered to grow up to the prejudice of the lord, as in this caſe of arbitrary fines, the law itſelf interpoſes in an equitable method, and will not ſuffer the lord to extend his power ſo far, as to diſinherit the tenant.

THUS much for the antient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally deſcended from it.

IV. THERE is yet a fourth ſpecies of tenure, deſcribed by Bracton under the name ſometimes of *privileged* villenage, and ſometimes of *villein-ſocage*. This, he tells us (k), is ſuch as has been held of the kings of England from the conqueſt

(i) 2 Ch. Rep. 134.

(k) *l.* 4. *tr.* 1. *c.* 28.

downwards;

downwards; that the tenants herein "*villana faciunt ſervi-*
"*tia, ſed certa et determinata*;" that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but muſt ſurrender them to the lord or his ſteward, to be again granted out and held in villenage. And from theſe circumſtances we may collect, that what he here deſcribes is no other than an exalted ſpecies of copyhold, ſubſiſting at this day, *viz.* the tenure in *antient demeſne*; to which, as partaking of the baſeneſs of villenage in the nature of its ſervices, and the freedom of ſocage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum ſocagium*.

ANTIENT demeſne conſiſts of thoſe lands or manors, which, though now perhaps granted out to private ſubjects, were actually in the hands of the crown in the time of Edward the confeſſor, or William the conqueror; and ſo appear to have been by the great ſurvey in the exchequer called domeſday book (l). The tenants of theſe lands, under the crown, were not all of the ſame order or degree. Some of them, as Britton teſtifies (m), continued for a long time pure and abſolute villeins, dependant on the will of the lord: and thoſe who have ſucceeded them in their tenures now differ from common copyholders in only a few points (n). Others were in great meaſure enfranchiſed by the royal favour: being only bound in reſpect of their lands to perform ſome of the better ſort of villein ſervices, but thoſe determinate and certain; as, to plough the king's land, to ſupply his court with proviſions, and the like; all of which are now changed into pecuniary rents: and in conſideration hereof they had many immunities and privileges granted to them (o); as, to try the right of their property in a peculiar court of their own, called a court of antient demeſne, by a peculiar proceſs denominated a writ of *right cloſe* (p); not to pay toll or taxes; nor to contribute to the expences of the knights of the ſhire; not to be put on juries, and the like (q).

(l) F. N. B. 14. 16.
(m) c. 66.
(n) F. N. B. 228.
(o) 4 Inſt. 269.
(p) F. N. B. 11.
(q) *Ibid.* 14.

Wardſhip, in copyhold eſtates, partakes both of that in chivalry and that in ſocage. Like that in chivalry, the lord is the legal guardian, who uſually aſſigns ſome relation of the infant tenant to act in his ſtead: and he, like guardian in ſocage, is accountable to his ward for the profits. Of fines, ſome are in the nature of primer ſeiſins, due on the death of each tenant, others are mere fines for alienation of the lands; in ſome manors only one of theſe ſorts can be demanded, in ſome both, and in others neither. They are ſometimes arbitrary and at the will of the lord, ſometimes fixed by cuſtom: but, even when arbitrary, the courts of law, in favour of the liberty of copyholders, have tied them down to be *reaſonable* in their extent; otherwiſe they might amount to a diſheriſon of the eſtate. No fine therefore is allowed to be taken upon deſcents and alienations, (unleſs in particular circumſtances) of more than two years improved value of the eſtate (i). From this inheritance we may judge of the favourable diſpoſition, that the law of England (which is a law of liberty) hath always ſhewn to this ſpecies of tenants; by removing, as far as poſſible, every real badge of ſlavery from them, however ſome nominal ones may continue. It ſuffered cuſtom very early to get the better of the expreſs terms upon which they held their lands; by declaring, that the will of the lord was to be interpreted by the cuſtom of the manor: and, where no cuſtom has been ſuffered to grow up to the prejudice of the lord, as in this caſe of arbitrary fines, the law itſelf interpoſes in an equitable method, and will not ſuffer the lord to extend his power ſo far, as to diſinherit the tenant.

THUS much for the antient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord*, which is lineally deſcended from it.

IV. THERE is yet a fourth ſpecies of tenure, deſcribed by Bracton under the name ſometimes of *privileged* villenage, and ſometimes of *villein-ſocage*. This, he tells us (k), is ſuch as has been held of the kings of England from the conqueſt

(i) 2 Ch. Rep. 134.

(k) *l.* 4. *tr.* 1. *c.* 28.

downwards;

downwards; that the tenants herein "*villana faciunt ſervi-*
"*tia, ſed certa et determinata*;" that they cannot aliene or transfer their tenements by grant or feoffment, any more than pure villeins can; but muſt ſurrender them to the lord or his ſteward, to be again granted out and held in villenage. And from theſe circumſtances we may collect, that what he here deſcribes is no other than an exalted ſpecies of copyhold, ſubſiſting at this day, *viz.* the tenure in *antient demeſne*; to which, as partaking of the baſeneſs of villenage in the nature of its ſervices, and the freedom of ſocage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum ſocagium*.

ANTIENT demeſne conſiſts of thoſe lands or manors, which, though now perhaps granted out to private ſubjects, were actually in the hands of the crown in the time of Edward the confeſſor, or William the conqueror; and ſo appear to have been by the great ſurvey in the exchequer called domeſday book (l). The tenants of theſe lands, under the crown, were not all of the ſame order or degree. Some of them, as Britton teſtifies (m), continued for a long time pure and abſolute villeins, dependant on the will of the lord: and thoſe who have ſucceeded them in their tenures now differ from common copyholders in only a few points (n). Others were in great meaſure enfranchiſed by the royal favour: being only bound in reſpect of their lands to perform ſome of the better ſort of villein ſervices, but thoſe determinate and certain; as, to plough the king's land, to ſupply his court with proviſions, and the like; all of which are now changed into pecuniary rents: and in conſideration hereof they had many immunities and privileges granted to them (o); as, to try the right of their property in a peculiar court of their own, called a court of antient demeſne, by a peculiar proceſs denominated a writ of *right cloſe* (p); not to pay toll or taxes; nor to contribute to the expences of the knights of the ſhire; not to be put on juries, and the like (q).

(l) F. N. B. 14. 16.
(m) c. 66.
(n) F. N. B. 228.
(o) 4 Inſt. 269.
(p) F. N. B. 11.
(q) *Ibid.* 14.

THESE tenants therefore, though their *tenure* be abſolutely copyhold, yet have an *intereſt* equivalent to a freehold: for, though their ſervices were of a baſe and villenous original (r), yet the tenants were eſteemed in all other reſpects to be highly privileged villeins; and eſpecially in this, that their ſervices were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquiſh theſe tenements at the lord's will, or to hold them againſt their own: "*et ideo*, ſays Bracton, *dicuntur liberi*." Britton alſo, from ſuch their freedom, calls them abſolutely *ſokemans*, and their tenure *ſokemanries*; which he deſcribes (s) to be "lands "and tenements which are not held by knight-ſervice, nor "by grand ſerjeanty, nor by petit, but by ſimple ſervices, "being as it were lands enfranchiſed by the king or his pre-"deceſſors from their antient demeſne." And the ſame name is alſo given to them in Fleta (t). Hence Fitzherbert obſerves (u) that no lands are antient demeſne, but lands holden in ſocage: that is, not in free and common ſocage, but in this amphibious, ſubordinate claſs, of villein-ſocage. And it is poſſible, that as this ſpecies of ſocage tenure is plainly founded upon predial ſervices, or ſervices of the plough, it may have given cauſe to imagine that all ſocage tenures aroſe from the ſame original; for want of diſtinguiſhing, with Bracton, between free-ſocage or ſocage of frank-tenure, and villein-ſocage or ſocage of antient demeſne.

LANDS held by this tenure are therefore a ſpecies of copyhold, and as ſuch preſerved and exempted from the operation of the ſtatute of Charles II. Yet they differ from common copyholds, principally in the privileges before-mentioned: as alſo they differ from freeholders by one eſpecial mark and tincture of villenage, noted by Bracton, and remaining to this day; *viz.* that they cannot be conveyed from man to man by the general common law conveyances of feoffment, and the reſt: but muſt paſs by ſurrender to the lord or his

(r) Gilb. hiſt. of the exch. 16. & 30.
(s) c. 66.
(t) *l.* 1. *c.* 8.
(u) F. N. B. 13.

ſteward,

ſteward, in the manner of common copyholds: yet with this difference (w), that, in theſe ſurrenders of lands in antient demeſne of frank tenure, it is not uſed to ſay "*to hold at* "*the will of the lord*" in their copies, but only "*to hold ac-* "*cording to the cuſtom of the manor.*"

THUS have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both antient and modern, in which we cannot but remark the mutual connexion and dependence that all of them have upon each other. And upon the whole it appears, that, whatever changes and alterations theſe tenures have in proceſs of time undergone, from the Saxon aera to the 12 Car. II. all lay tenures are now in effect reduced to two ſpecies; *free* tenure in common ſocage; and *baſe* tenure by copy of court roll.

I MENTIONED *lay* tenures only; becauſe there is ſtill behind one other ſpecies of tenure, reſerved by the ſtatute of Charles II. which is of a *ſpiritual* nature, and called the tenure in frankalmoign.

V. TENURE in *frankalmoign, in libera eleemoſyna*, or free alms, is that, whereby a religious corporation, aggregate or ſole, holdeth lands of the donor to them and their ſucceſſors for ever (x). The ſervice, which they were bound to render for theſe lands was not certainly defined; but only in general to pray for the ſouls of the donor and his heirs, dead or alive; and therefore they did no fealty, (which is incident to all other ſervices but this) (y) becauſe this divine ſervice was of a higher and more exalted nature (z). This is the tenure by which almoſt all the antient monaſteries and religious houſes held their lands; and by which the parochial clergy, and very many eccleſiaſtical and eleemoſynary foundations, hold them at this day (a); the nature of the ſervice being upon the reformation altered, and made conformable

(w) Kitchen on courts. 194.
(x) Litt. §. 133.
(y) *Ibid.* 131.
(z) *Ibid.* 135.
(a) Bracton. *l.* 4. *tr.* 1. *c.* 28. §. 1.

to the purer doctrines of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great reſpect that was ſhewn to religion and religious men in antient times. Which is alſo the reaſon that tenants in *frankalmoign* were diſcharged of all other ſervices, except the *trinoda neceſſitas*, of repairing the highways, building caſtles, and repelling invaſions (b): juſt as the druids, among the antient Britons, had *omnium rerum immunitatem* (c). And, even at preſent, this is a tenure of a nature very diſtinct from all others; being not in the leaſt feodal, but merely ſpiritual. For if the ſervice be neglected, the law gives no remedy by diſtreſs or otherwiſe to the lord of whom the lands are holden; but merely a complaint to the ordinary or viſitor to correct it (d). Wherein it materially differed from what was called *tenure by divine ſervice:* in which the tenants were obliged to do ſome ſpecial divine ſervices in certain; as to ſing ſo many maſſes, to diſtribute ſuch a ſum in alms, and the like; which, being expreſsly defined and preſcribed, could with no kind of propriety be called *free* alms; eſpecially as for this, if unperformed, the lord might diſtrein, without any complaint to the viſitor (e). All ſuch donations are indeed now out of uſe: for, ſince the ſtatute of *quia emptores*, 18 Edw. I, none but the king can give lands to be holden by this tenure (f). So that I only mention them, becauſe *frankalmoign* is excepted by name in the ſtatute of Charles II, and therefore ſubſiſts in many inſtances at this day. Which is all that ſhall be remarked concerning it; herewith concluding our obſervations on the nature of tenures.

(b) Seld. *Jan.* 1. 42.
(c) Caeſar *de bell. Gal. l.* 6. *c.* 13.
(d) Litt. §. 136.
(e) *Ibid.* 137.
(f) *Ibid.* 140.

CHAPTER

CHAPTER THE SEVENTH.

OF FREEHOLD ESTATES, OR INHERITANCE.

THE next objects of our diſquiſitions are the nature and properties of *eſtates*. An eſtate in lands, tenements, and hereditaments, ſignifies ſuch intereſt as the tenant hath therein: ſo that if a man grants all *his eſtate* in Dale to A and his heirs, every thing that he can poſſibly grant ſhall paſs thereby (a). It is called in Latin, *ſtatus*; it ſignifying the condition, or circumſtance, in which the owner ſtands, with regard to his property. And, to aſcertain this with proper preciſion and accuracy, eſtates may be conſidered in a threefold view: firſt, with regard to the *quantity of intereſt* which the tenant has in the tenement: ſecondly, with regard to the *time* at which that quantity of intereſt is to be enjoyed: and, thirdly, with regard to the *number* and *connexions* of the tenants.

FIRST, with regard to the *quantity of intereſt* which the tenant has in the tenement, this is meaſured by its duration and extent. Thus, either his right of poſſeſſion is to ſubſiſt for an uncertain period, during his own life, or the life of another man; to determine at his own deceaſe, or to remain to his deſcendants after him: or it is circumſcribed within a certain number of years, months, or days: or, laſtly, it is infinite and unlimited, being veſted in him and his repreſentatives for ever. And this occaſions the primary diviſion of

(a) Co. Litt. 345.

eſtates, into ſuch as are *freehold*, and ſuch as are *leſs than freehold*.

AN eſtate of freehold, *liberum tenementum*, or frank tenement, is defined by Britton (b) to be "the *poſſeſſion* of the "ſoil by a freeman." And St. Germyn (c) tells us, that "the *poſſeſſion* of the land is called in the law of England "the franktenement or freehold." Such eſtate therefore, and no other, as requires actual poſſeſſion of the land, is legally ſpeaking freehold; which actual poſſeſſion can, by the courſe of the common law, be only given by the ceremony called livery of ſeiſin, which is the ſame as the feodal inveſtiture. And from theſe principles we may extract this deſcription of a freehold, that it is ſuch an eſtate in lands as is conveyed by livery of ſeiſin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton (d), that where a freehold ſhall paſs, it behoveth to have livery of ſeiſin. As therefore eſtates of inheritance and eſtates for life could not by common law be conveyed without livery of ſeiſin, theſe are properly eſtates of freehold; and, as no other eſtates were conveyed with the ſame ſolemnity, therefore no others are properly freehold eſtates.

ESTATES of freehold then are diviſible into eſtates *of inheritance*, and eſtates *not of inheritance*. The former are again divided into inheritances *abſolute* or fee-ſimple; and inheritances *limited*, one ſpecies of which we uſually call fee-tail.

I. TENANT in fee-ſimple (or, as he is frequently ſtiled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs for ever (e); generally, abſolutely, and ſimply; without mentioning *what* heirs, but referring that to his own pleaſure, or to the diſpoſition of the law. The true meaning of the word fee *(feodum)* is the ſame with that of feud or fief, and in its original ſenſe it is taken in contradiſtinction to

(b) c. 32.
(c) Dr. and Stud. b. 2. d. 22.
(d) §. 59.
(e) Litt. §. 1.

allodium;

allodium (f); which latter the writers on this ſubject define to be every man's own land, which he poſſeſſeth merely in his own right, without owing any rent or ſervice to any ſuperior. This is property in its higheſt degree; and the owner thereof hath *abſolutum et directum dominium*, and therefore is ſaid to be ſeiſed thereof abſolutely *in dominico ſuo*, in his own demeſne. But *feodum*, or fee, is that which is held of ſome ſuperior, on condition of rendering him ſervice; in which ſuperior the ultimate property of the land reſides. And therefore ſir Henry Spelman (g) defines a feud or fee to be the right which the vaſal or tenant hath in lands, to *uſe* the ſame, and take the profits thereof to him and his heirs, rendering to the lord his due ſervices; the mere allodial *propriety* of the ſoil always remaining in the lord. This allodial property no ſubject in England has (h); it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *abſolutum et directum dominium* (i); but all ſubjects lands are in the nature of *feodum* or fee; whether derived to them by deſcent from their anceſtors, or purchaſed for a valuable conſideration; for they cannot come to any man by either of thoſe ways, unleſs accompanied with thoſe feodal clogs, which were laid upon the firſt feudatory when it was originally granted. A ſubject therefore hath only the uſufruct, and not the abſolute property of the ſoil: or, as ſir Edward Coke expreſſes it (k), he hath *dominium utile*, but not *dominium directum*. And hence it is that, in the moſt ſolemn acts of law, we expreſs the ſtrongeſt and higheſt eſtate, that any ſubject can have, by theſe words; "he is ſeiſed thereof *in his demeſne, as of* "*fee.*" It is a man's demeſne, *dominicum*, or property, ſince it belongs to him and his heirs for ever: yet this *dominicum*, property, or demeſne, is ſtrictly not abſolute or allodial, but qualified or feodal: it is his demeſne, *as of fee*; that is, it is not purely and ſimply his own, ſince it is held of a ſuperior lord, in whom the ultimate property reſides.

(f) See pag. 45, 47.
(g) of feuds, c. 1.
(h) Co. Litt. 1.
(i) *Praedium domini regis eſt directum dominium, cujus nullus eſt author niſi Deus. Ibid.*
(k) *Ibid.*

THIS

THIS is the primary ſenſe and acceptation of the word *fee*. But (as ſir Martin Wright very juſtly obſerves) (l) the doctrine, "that all lands are holden," having been for ſo many ages a fixed and undeniable axiom, our Engliſh lawyers do very rarely (of late years eſpecially) uſe the word *fee* in this its primary original ſenſe, in contradiſtinction to *allodium* or abſolute property, with which they have no concern; but generally uſe to expreſs the continuance or quantity of eſtate. A *fee* therefore, in general, ſignifies an eſtate of inheritance; being the higheſt and moſt extenſive intereſt that a man can have in a feud: and, when the term is uſed ſimply, without any other adjunct, or has the adjunct of *ſimple* annexed to it, (as, a fee, or, a fee-ſimple) it is uſed in contradiſtinction to a fee conditional at common law, or a fee-tail by the ſtatute; importing an abſolute inheritance, clear of any condition, limitation, or reſtrictions to particular heirs, but deſcendible to the heirs general, whether male or female, lineal or collateral. And in no other ſenſe than this is the king ſaid to be ſeiſed in fee, he being the feudatory of no man (m).

TAKING therefore *fee* for the future, unleſs where otherwiſe explained, in this its ſecondary ſenſe, as a ſtate of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal (n). But there is this diſtinction between the two ſpecies of hereditaments; that, of a corporeal inheritance a man ſhall be ſaid to be ſeiſed *in his demeſne, as of fee*; of an incorporeal one he ſhall only be ſaid to be ſeiſed *as of fee*, and not in his demeſne (o). For, as incorporeal hereditaments are in their nature collateral to, and iſſue out of, lands and houſes (p), their owner hath no property, *dominicum*, or demeſne, in the thing itſelf, but hath only ſomething derived out of it; reſembling the *ſervitutes*, or ſervices, of the civil law (q). The *domini-*

(l) pag. 148.
(m) Co. Litt. 1.
(n) *Feodum eſt quod quis tenet ſibi et heredibus ſuis, ſive ſit tenementum, ſive reditus, &c.* Flet. *l.* 5. *c.* 5. §. 7.
(o) Litt. §. 10.
(p) See pag. 20.
(q) *Servitus eſt jus, quo res mea alterius rei vel perſonae ſervit. Ff.* 8. 1. 1.

cum

cum or property is frequently in one man, while the appendage or ſervice is in another. Thus Gaius may be ſeiſed *as of fee*, of a way going over the land, of which Titius is ſeiſed *in his demeſne as of fee*.

THE fee-ſimple or inheritance of lands and tenements is generally veſted and reſides in ſome perſon or other; though divers inferior eſtates may be carved out of it. As if one grants a leaſe for twenty-one years, or for one or two lives, the fee-ſimple remains veſted in him and his heirs; and after the determination of thoſe years or lives, the land reverts to the grantor or his heirs, who ſhall hold it again in fee-ſimple. Yet ſometimes the fee may be in *abeyance*, that is, (as the word ſignifies) in expectation, remembrance, and contemplation in law; there being no perſon *in eſſe*, in whom it can veſt and abide; though the law conſiders it as always potentially exiſting, and ready to veſt whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it veſt in the heirs of Richard till his death, *nam nemo eſt haeres viventis:* it remains therefore in waiting, or abeyance, during the life of Richard (r). This is likewiſe always the caſe of a parſon of a church, who hath only an eſtate therein for the term of his life: and the inheritance remains in abeyance (s). And not only the fee, but the freehold alſo, may be in abeyance; as, when a parſon dies, the freehold of his glebe is in abeyance, until a ſucceſſor be named, and then it veſts in the ſucceſſor (t).

THE word, heirs, is neceſſary in the grant or donation in order to make a fee, or inheritance. For if land be given to a man for ever, or to him and his aſſigns for ever, this veſts in him but an eſtate for life (u). This very great nicety about the inſertion of the word "heirs" in all feoffments and grants, in order to veſt a fee, is plainly a relick of the feodal ſtrictneſs: by which we may remember (w) it was required, that the form of the donation ſhould be punctually purſued;

(r) Co. Litt. 342.
(s) Litt. §. 646.
(t) *Ibid.* 647.
(u) Litt. §. 1.
(w) See pag. 56.

or

or that, as Crag (x) expreſſes it, in the words of Baldus, "*donationes ſint ſtricti juris, ne quis plus donaſſe praeſumatur quam in donatione expreſſerit.*" And therefore, as the perſonal abilities of the donee were originally ſuppoſed to be the only inducements to the gift, the donee's eſtate in the land extended only to his own perſon, and ſubſiſted no longer than his life; unleſs the donor, by an expreſs proviſion in the grant, gave it a longer continuance, and extended it alſo to his heirs. But this rule is now ſoftened by many exceptions (y).

For, 1. It does not extend to deviſes by will; in which, as they were introduced at the time when the feodal rigor was apace wearing out, a more liberal conſtruction is allowed: and therefore by a deviſe to a man for ever, or to one and his aſſigns for ever, or to one in fee-ſimple, the deviſee hath an eſtate of inheritance; for the intention of the deviſor is ſufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the deviſe be to a man and his aſſigns, without annexing words of perpetuity, there the deviſee ſhall take only an eſtate for life; for it does not appear that the deviſor intended any more. 2. Neither does this rule extend to fines or recoveries, conſidered as a ſpecies of conveyance; for thereby an eſtate in fee paſſes by act and operation of law without the word "heirs:" as it does alſo, for particular reaſons, by certain other methods of conveyance, which have relation to a former grant or eſtate, wherein the word "heirs" was expreſſed (z). 3. In creations of nobility by writ, the peer ſo created hath an inheritance in his title, without expreſſing the word "heirs;" for they are implied in the creation, unleſs it be otherwiſe ſpecially provided: but in creations by patent, which are *ſtricti juris*, the word "heirs" muſt be inſerted, otherwiſe there is no inheritance. 4. In grants of lands to ſole corporations and their ſucceſſors, the word "ſucceſſors" ſupplies the place of "heirs;" for as heirs take from the anceſtor, ſo doth the ſucceſſor from

(x) *l.* 1. *t.* 9. §. 17.
(y) Co. Litt. 9, 10.
(z) *Ibid.* 9.

the

the predeceſſor. Nay, in a grant to a biſhop, or other ſole ſpiritual corporation, in *frankalmoign*, the word "*frankal-*" "*moign*" ſupplies the place of both "heirs" and "ſucceſ-" "ſors," *ex vi termini*; and in all theſe caſes a fee-ſimple veſts in ſuch ſole corporation. But, in a grant of lands to a corporation aggregate, the word "ſucceſſors" is not neceſſary, though uſually inſerted: for, albeit ſuch ſimple grant be ſtrictly only an eſtate for life, yet, as that corporation never dies, ſuch eſtate for life is perpetual, or equivalent to a fee-ſimple, and therefore the law allows it to be one (a). Laſtly, in the caſe of the king, a fee-ſimple will veſt in him, without the words "heirs" or "ſucceſſors" in the grant; partly from prerogative royal, and partly from a reaſon ſimilar to the laſt, becauſe the king in judgment of law never dies (b). But the general rule is, that the word "heirs" is neceſſary to create an eſtate of inheritance.

II. WE are next to conſider limited fees, or ſuch eſtates of inheritance as are clogged or confined with conditions, or qualifications, of any ſort. And theſe we may divide into two ſorts: 1. *Qualified*, or *baſe* fees; and 2. Fees *conditional*, ſo called at the common law; and afterwards fees-*tail*, in conſequence of the ſtatute *de donis*.

1. A BASE, or qualified, fee is ſuch a one as has a qualification ſubjoined thereto, and which muſt be determined whenever the qualification annexed to it is at an end. As, in the caſe of a grant to A and his heirs, *tenants of the manor of Dale*; in this inſtance, whenever the heirs of A ceaſe to be tenants of that manor, the grant is intirely defeated. So, when Henry VI granted to John Talbot, lord of the manor of Kingſton-Liſle in Berks, that he and his heirs, lords of the ſaid manor, ſhould be peers of the realm, by the title of barons of Liſle; here John Talbot had a baſe or qualified fee in that dignity (c); and the inſtant he or his heirs quitted the ſeignory of this manor, the dignity was at an end. This

(a) See Vol. I. pag. 472.
(b) *Ibid.* 242.
(c) Co. Litt. 27.

eſtate

eſtate is a fee, becauſe by poſſibility it may endure for ever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumſtances, which qualify and debaſe the purity of the donation, it is therefore a qualified or baſe fee.

2. A CONDITIONAL fee, at the common law, was a fee reſtrained to ſome particular heirs, excluſive of others; "*donatio ſtricta et coarctata* (d); *ſicut certis haeredibus, quibuſdam a ſucceſſione excluſis:*" as, to the heirs *of a man's body*, by which only his lineal deſcendants were admitted, in excluſion of collateral heirs; or, to the heirs *male of his body*, in excluſion both of collaterals, and lineal females alſo. It was called a conditional fee, by reaſon of the condition expreſſed or implied in the donation of it, that if the donee died without ſuch particular heirs, the land ſhould revert to the donor. For this was a condition annexed by law to all grants whatſoever; that on failure of the heirs ſpecified in the grant, the grant ſhould be at an end, and the land return to its antient proprietor (e). Such conditional fees were ſtrictly agreeable to the nature of feuds, when they firſt ceaſed to be mere eſtates for life, and were not yet arrived to be abſolute eſtates in fee-ſimple. And we find ſtrong traces of theſe limited, conditional fees, which could not be alienated from the lineage of the firſt purchaſer, in our earlieſt Saxon laws (f).

Now, with regard to the condition annexed to theſe fees by the common law, our anceſtors held, that ſuch a gift (to a man and the heirs of his body) was a gift upon condition, that it ſhould revert to the donor, if the donee had no heirs of his body; but, if he had, it ſhould then remain to the donee. They therefore called it a fee-ſimple, on condition that he had iſſue. Now we muſt obſerve, that, when any condition is performed, it is thenceforth entirely gone; and the thing, to which it was before annexed, becomes abſolute,

(d) Flet. *l.* 3. *c.* 3. §. 5.
(e) Plowd. 241.
(f) *Si quis terram haereditariam habeat, eam non vendat a cognatis haeredibus ſuis, ſi illi viro prohibitum ſit, qui eam ab initio acquiſivit, ut ita facere nequeat.* LL. *Aelfred.* c. 37.

and

and wholly unconditional. So that, as ſoon as the grantee had any iſſue born, his eſtate was ſuppoſed to become abſolute, by the performance of the condition; at leaſt, for theſe three purpoſes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own iſſue, but alſo the donor of his intereſt in the reverſion (g). 2. To ſubject him to forfeit it for treaſon: which he could not do, till iſſue born, longer than for his own life; leſt thereby the inheritance of the iſſue, and reverſion of the donor, might have been defeated (h). 3. To empower him to charge the land with rents, commons, and certain other incumbrances, ſo as to bind his iſſue (i). And this was thought the more reaſonable, becauſe, by the birth of iſſue, the poſſibility of the donor's reverſion was rendered more diſtant and precarious: and *his* intereſt ſeems to have been the only one which the law, as it then ſtood, was ſolicitous to protect; without much regard to the right of ſucceſſion intended to be veſted in the iſſue. However, if the tenant did not in fact aliene the land, the courſe of deſcent was not altered by this performance of the condition: for if the iſſue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could deſcend to none but the heirs *of his body*, and therefore, in default of them, muſt have reverted to the donor. For which reaſon, in order to ſubject the lands to the ordinary courſe of deſcent, the donees of theſe conditional fee-ſimples took care to aliene as ſoon as they had performed the condition by having iſſue; and afterwards re-purchaſed the lands, which gave them a fee-ſimple abſolute, that would deſcend to the heirs general, according to the courſe of the common law. And thus ſtood the old law with regard to conditional fees: which things, ſays ſir Edward Coke (k), though they ſeem antient, are yet neceſſary to be known; as well for the declaring how the common law ſtood in ſuch caſes, as for the ſake of annuities, and ſuch like inheritances, as are not within the ſtatutes of entail, and therefore remain as at the common law.

(g) Co. Litt. 19. 2 Inſt. 233.
(h) Co. Litt. 19. 2 Inſt. 234.
(i) Co Litt. 19.
(k) 1 Inſt. 19.

THE

THE inconvenience, which attended theſe limited and fettered inheritances, were probably what induced the judges to give way to this ſubtle fineſſe (for ſuch it undoubtedly was) in order to ſhorten the duration of theſe conditional eſtates. But, on the other hand, the nobility, who were willing to perpetuate their poſſeſſions in their own families, to put a ſtop to this practice, procured the ſtatute of Weſtminſter the ſecond (l) (commonly called the ſtatute *de donis conditionalibus)* to be made; which pays a greater regard to the private will and intentions of the donor, than to the propriety of ſuch intentions, or any public conſiderations whatſoever. This ſtatute revives in ſome ſort the antient feodal reſtraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be obſerved; and that the tenements ſo given (to a man and the heirs of his body) ſhould at all events go to the iſſue, if there were any; or, if none, ſhould revert to the donor.

UPON the conſtruction of this act of parliament, the judges determined that the donee had no longer a conditional fee-ſimple, which became abſolute and at his own diſpoſal, the inſtant any iſſue was born; but they divided the eſtate into two parts, leaving in the donee a new kind of particular eſtate, which they denominated a *fee-tail* (m); and veſting in the donor the ultimate fee-ſimple of the land, expectant on the failure of iſſue; which expectant eſtate is what we now call a reverſion (n). And hence it is that Littleton tells us (o), that tenant in fee-tail is by virtue of the ſtatute of Weſtminſter the ſecond.

HAVING thus ſhewn the *original* of eſtates-tail, I now proceed to conſider, *what things* may, or may not, be entailed

(l) 13 Edw. 1. c. 1.

(m) The expreſſion *fee-tail*, or *feodum taliatum*, was borrowed from the feudiſts; (See Crag. *l.* 1. *t.* 10. §. 24, 25.) among whom it ſignified any mutilated or truncated inheritance, from which the heirs general were *cut* off; being derived from the barbarous verb *taliare*, to cut: from which the French *tailler* and the Italian *tagliare* are formed. (Spelm. *Gloſſ.* 531.)

(n) 2 Inſt. 335.

(o) §. 13.

under

under the ſtatute *de donis*. *Tenements* is the only word uſed in the ſtatute: and this ſir Edward Coke (p) expounds to comprehend all corporeal hereditaments whatſoever; and alſo all incorporeal hereditaments which ſavour of the realty, that is, which iſſue out of corporeal ones, or which concern, or are annexed to, or may be exerciſed within the ſame; as, rents, eſtovers, commons, and the like. Alſo offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed (q). But mere perſonal chattels, which ſavour not at all of the realty, cannot be entailed. Neither can any office, which merely relates to ſuch perſonal chattels; nor an annuity, which charges only the perſon, and not the lands, of the grantor. But in them, if granted to a man and the heirs of his body, the grantee hath ſtill a fee conditional at common law, as before the ſtatute; and by his alienation may bar the heir or reverſioner (r). An eſtate to a man and his heirs for another's life cannot be entailed (s); for this is ſtrictly no eſtate of inheritance (as will appear hereafter) and therefore not within the ſtatute *de donis*. Neither can a copyhold eſtate be entailed by virtue of this *ſtatute*; for that would tend to encroach upon and reſtrain the will of the lord: but, by the *ſpecial cuſtom* of the manor, a copyhold may be limited to the heirs of the body (t); for here the cuſtom aſcertains and interprets the lord's will.

NEXT, as to the ſeveral *ſpecies* of eſtates-tail, and how they are reſpectively created. Eſtates-tail are either *general*, or *ſpecial*. Tail general is where lands and tenements are given to one, and the *heirs of his body begotten*: which is called tail-general, becauſe, how often ſoever ſuch donee in tail be married, his iſſue in general by all and every ſuch marriage is, in ſucceſſive order, capable of inheriting the eſtate-tail, *per formam doni* (u). Tenant in tail-ſpecial is where the gift is reſtrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen

(p) 1 Inſt. 19, 20.
(q) 7 Rep. 33.
(r) Co. Litt. 19, 20.
(s) 2 Vern. 225.
(t) 3 Rep. 8.
(u) Litt. §. 14, 15.

ſeveral ways (w). I ſhall inſtance in only one: as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten*; here no iſſue can inherit, but ſuch ſpecial iſſue as is engendered between them two; not ſuch as the huſband may have by another wife: and therefore it is called ſpecial tail. And here we may obſerve, that the words of inheritance (to him and his *heirs)* give him an eſtate in fee; but they being heirs *to be by him begotten*, this makes it a fee-tail; and the perſon being alſo limited, on whom ſuch heirs ſhall be begotten, (viz. *Mary his preſent wife)* this makes it a fee-tail ſpecial.

Estates, in general and ſpecial tail, are farther diverſified by the diſtinction of ſexes in ſuch entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*, this is an eſtate in tail male general; but if to a man and the *heirs female of his body on his preſent wife begotten*, this is an eſtate in tail female ſpecial. And, in caſe of an entail mail, the heirs female ſhall never inherit, nor any derived from them; nor, *e converſo*, the heirs male, in caſe of a gift in tail female (x). Thus, if the donee in tail male hath a daughter, who dies leaving a ſon, ſuch grandſon in this caſe cannot inherit the eſtate-tail; for he cannot deduce his deſcent wholly by heirs male (y). And as the heir male muſt convey his deſcent wholly by males, ſo muſt the heir female wholly by females. And therefore if a man hath two eſtates-tail, the one in tail mail, the other in tail female; and he hath iſſue a daughter, which daughter hath iſſue a ſon; this grandſon can ſucceed to neither of the eſtates: for he cannot convey his deſcent wholly either in the male or female line (z).

As the word *heirs* is neceſſary to create a fee, ſo, in farther imitation of the ſtrictneſs of the feodal donation, the word *body*, or ſome other words of procreation, are neceſſary

(w) Litt. §. 16. 26, 27, 28, 29.
(x) *Ibid.* §. 21, 22.
(y) Litt. §. 24.
(z) Co. Lit. §. 25.

to

to make it a fee-tail, and aſcertain to what heirs in particular the fee is limited. If therefore either the words of inheritance or words of procreation be omitted, albeit the others are inſerted in the grant, this will not make an eſtate-tail. As, if the grant be to a man and his *iſſue of his body*, to a man and his *ſeed*, to a man and his *children*, or *offſpring*; all theſe are only eſtates for life, there wanting the words of inheritance, his heirs (a). So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an eſtate in fee-ſimple, and not in fee-tail; for there are no words to aſcertain the body out of which they ſhall iſſue (b). Indeed, in laſt wills and teſtaments, wherein greater indulgence is allowed, an eſtate-tail may be created by a deviſe to a man and his *ſeed*, or to a man and his *heirs male*; or by other irregular modes of expreſſion (c).

THERE is ſtill another ſpecies of entailed eſtates, now indeed grown out of uſe, yet ſtill capable of ſubſiſting in law; which are eſtates *in libero maritagio* or *frankmarriage*. Theſe are defined (d) to be, where tenements are given by one man to another, together with a wife, who is the daughter or couſin of the donor, to hold in frankmarriage. Now by ſuch gift, though nothing but the word *frankmarriage* is expreſſed, the donees ſhall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in ſpecial tail. For this one word, *frankmarriage*, does *ex vi termini* not only create an inheritance, like the word *frankalmoign*, but likewiſe limits that inheritance; ſupplying not only words of deſcent, but of procreation alſo. Such donees in frankmarriage are liable to no ſervice but fealty; for a rent reſerved thereon is void, until the fourth degree of conſanguinity be paſt between the iſſues of the donor and donee (e).

THE *incidents* to a tenancy in tail, under the ſtatute Weſtm. 2. are chiefly theſe (f). 1. That a tenant in tail may commit *waſte* on the eſtate-tail, by felling timber, pul-

(a) Co. Litt. 20.
(b) Litt. §. 31. Co. Litt. 27.
(c) Co. Litt. 9. 27.
(d) Litt. §. 17.
(e) Litt. §. 19, 20.
(f) Co. Litt. 224.

ling down houſes, or the like, without being impeached, or called to account, for the ſame. 2. That the wife of the tenant in tail ſhall have her *dower*, or thirds, of the eſtate-tail. 3. That the huſband of a female tenant in tail may be tenant by the *curteſy* of the eſtate-tail. 4. That an eſtate-tail may be *barred*, or deſtroyed, by a fine, by a common recovery, or by lineal warranty deſcending with aſſets to the heir. All which will hereafter be explained at large.

THUS much for the nature of eſtates-tail: the eſtabliſhment of which family law (as it is properly ſtiled by Pigot) (g) occaſioned infinite difficulties and diſputes (h). Children grew diſobedient when they knew they could not be ſet aſide: farmers were ouſted of their leaſes made by tenants in tail; for, if ſuch leaſes had been valid, then under colour of long leaſes the iſſue might have been virtually diſinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his eſtate with their payment, he might alſo have defeated his iſſue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchaſers of the lands they had fairly bought; of ſuits in conſequence of which our antient books are full: and treaſons were encouraged; as eſtates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were juſtly branded, as the ſource of new contentions, and miſchiefs unknown to the common law; and almoſt univerſally conſidered as the common grievance of the realm (i). But, as the nobility were always fond of this ſtatute, becauſe it preſerved their family eſtates from forfeiture, there were little hopes of procuring a repeal by the legiſlature; and therefore, by the connivance of an active and politic prince, a method was deviſed to evade it.

ABOUT two hundred years intervened between the making of the ſtatute *de donis*, and the application of common recoveries to this intent, in the twelfth year of Edward IV: which were then openly declared by the judges to be a ſuffi-

(g) Com. Recov. 5.
(h) 1 Rep. 131.
(i) Co. Litt. 19. Moor. 156. 10. Rep. 38.

cient

cient bar of an eſtate-tail (k). For though the courts had, ſo long before as the reign of Edward III, very frequently hinted their opinion that a bar might be effected upon theſe principles (l), yet it never was carried into execution; till Edward IV obſerving (m) (in the diſputes between the houſes of York and Lancaſter) how little effect attainders for treaſon had on families, whoſe eſtates were protected by the ſanctuary of entails, gave his countenance to this proceeding, and ſuffered Taltarum's caſe to be brought before the court (n): wherein, in conſequence of the principles then laid down, it was in effect determined, that a common recovery ſuffered by tenant in tail ſhould be an effectual deſtruction thereof. What common recoveries are, both in their nature and conſequences, and why they are allowed to be a bar to the eſtate-tail, muſt be reſerved to a ſubſequent enquiry. At preſent I ſhall only ſay, that they are fictitious proceedings, introduced by a kind of *pia fraus*, to elude the ſtatute *de donis*, which was found ſo intolerably miſchievous, and which yet one branch of the legiſlature would not then conſent to repeal: and, that theſe recoveries, however clandeſtinely begun, are now become by long uſe and acquieſcence a moſt common aſſurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may diſpoſe of his lands and tenements: ſo that no court will ſuffer them to be ſhaken or reflected on, and even acts of parliament (o) have by a ſidewind countenanced and eſtabliſhed them.

THIS expedient having greatly abridged eſtates-tail with regard to their duration, others were ſoon invented to ſtrip them of other privileges. The next that was attacked was their freedom from forfeitures for treaſon. For, notwithſtanding the large advances made by recoveries, in the compaſs of about threeſcore years, towards unfettering theſe inheritances, and thereby ſubjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently re-

(k) 1 Rep. 131. 6 Rep. 40.
(l) 10 Rep. 37, 38.
(m) Pigott. 8.
(n) Year Book. 12 Edw. IV. 14. 19. Fitzh. *Abr. tit. faux recov.* 20. Bro. *Abr. ibid.* 30. *tit. recov in value.* 19. *tit. taile.* 36.
(o) 11 Hen. VII. c. 20. 7 Hen. VIII. c. 4. 34 & 35. Hen. VIII. c. 20. 14 Eliz. c. 8. 4 & 5 Ann. c. 16. 14 Geo. II. c. 20.

ſettled in a ſimilar manner to ſuit the convenience of families, had addreſs enough to procure a ſtatute (p), whereby all eſtates of inheritance (under which general words eſtates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treaſon.

THE next attack which they ſuffered, in order of time, was by the ſtatute 32 Hen. VIII. c. 28. whereby certain leaſes made by tenants in tail, which do not tend to the prejudice of the iſſue, were allowed to be good in law, and to bind the iſſue in tail. But they received a more violent blow, in the ſame ſeſſion of parliament, by the conſtruction put upon the ſtatute of fines (q), by the ſtatute 32 Hen. VIII. c. 36. which declares a fine duly levied by tenant in tail to be a complete bar to him and his heir, and all other perſons, claiming under ſuch entail. This was evidently agreeable to the intention of Henry VII, whoſe policy it was (before common recoveries had obtained their full ſtrength and authority) to lay the road as open as poſſible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the oppoſite reaſons, were not eaſily brought to conſent to ſuch a proviſion, it was therefore couched, in his act, under covert and obſcure expreſſions. And the judges, though willing to conſtrue that ſtatute as favourably as poſſible for the defeating of entailed eſtates, yet heſitated at giving fines ſo extenſive a power by mere implication, when the ſtatute *de donis* had expreſsly declared, that they ſhould *not* be a bar to eſtates-tail. But the ſtatute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and eſtabliſhed that intention. Yet, in order to preſerve the property of the crown from any danger of infringement, all eſtates-tail created by the crown, and of which the crown has the reverſion, are excepted out of this ſtatute. And the ſame was done with regard to common recoveries, by the ſtatute 34 & 35 Hen. VIII. c. 20. which enacts, that no feigned recovery had againſt tenants in tail, where the eſtate was

(p) 26 Hen. VIII. c. 13. (q) 4 Hen. VII. c. 24.

created

created by the crown (r), and the remainder or reverſion continues ſtill in the crown, ſhall be of any force or effect. Which is allowing, indirectly and collaterally, their full force and effect with reſpect to ordinary eſtates-tail, where the royal prerogative is not concerned.

LASTLY, by a ſtatute of the ſucceeding year (s), all eſtates-tail are rendered liable to be charged for payment of debts due to the king by record or ſpecial contract; as, ſince, by the bankrupt laws (t), they are alſo ſubjected to be ſold for the debts contracted by a bankrupt. And, by the conſtruction put on the ſtatute 43 Eliz. c. 4. an appointment (u) by tenant in tail of the lands entailed, to a charitable uſe, is good without fine or recovery.

ESTATES-TAIL, being thus by degrees unfettered, are now reduced again to almoſt the ſame ſtate, even before iſſue born, as conditional fees were in at common law, after the condition was performed, by the birth of iſſue. For, firſt, the tenant in tail is now enabled to aliene his lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the intereſt, as well of his own iſſue, though unborn, as alſo of the reverſioner, except in the caſe of the crown: ſecondly, he is now liable to forfeit them for high treaſon: and, laſtly, he may charge them with reaſonable leaſes, and alſo with ſuch of his debts as are due to the crown on ſpecialties, or have been contracted with his fellow-ſubjects in a courſe of extenſive commerce.

(r) Co. Litt. 372.
(s) 33 Hen. VIII. c. 39. §. 75.
(t) Stat. 21 Jac. I. c. 19.
(u) 2 Vern. 453. Chan. Prec. 16.

CHAPTER THE EIGHTH.

OF FREEHOLDS, NOT OF INHERITANCE.

WE are next to diſcourſe of ſuch eſtates of freehold, as are not of inheritance, but *for life* only. And, of theſe eſtates for life, ſome are *conventional*, or expreſsly created by the act of the parties; others merely *legal*, or created by conſtruction and operation of law (a). We will conſider them both in their order.

I. ESTATES for life, expreſsly created by deed or grant, (which alone are properly conventional) are where a leaſe is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other perſon, or for more lives than one: in any of which caſes he is ſtiled tenant for life; only, when he holds the eſtate by the life of another, he is uſually called tenant *pur auter vie* (b). Theſe eſtates for life are, like inheritances, of a feodal nature; and were, for ſome time, the higheſt eſtate that any man could have in a feud, which (as we have before ſeen) (c) was not in its original hereditary. They are given or conferred by the ſame feodal rites and ſolemnities, the ſame inveſtiture or livery of ſeiſin, as fees themſelves are; and they are held by fealty, if demanded, and ſuch conventional rents and ſervices as the lord or leſſor, and his tenant or leſſee, have agreed on.

(a) Wright. 190. (b) Litt. §. 56. (c) pag. 55.

ESTATES

ESTATES for life may be created, not only by the expreſs words before-mentioned, but alſo by a general grant, without defining or limiting any ſpecific ſtate. As, if one grants to A. B. the manor of Dale, this makes him tenant for life (d). For though, as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be conſtrued to be a fee, it ſhall however be conſtrued to be as large an eſtate as the words of the donation will bear, and therefore an eſtate for life. Alſo ſuch a grant at large, or grant for term of life generally, ſhall be conſtrued to be an eſtate for the life *of the grantee* (e); in caſe the grantor hath authority to make ſuch a grant: for an eſtate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken moſt ſtrongly againſt the grantor (f), unleſs in the caſe of the king.

SUCH eſtates for life will, generally ſpeaking, endure as long as the life for which they are granted: but there are ſome eſtates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an eſtate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in theſe, and ſimilar caſes, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the reſpective eſtates are abſolutely determined and gone (g). Yet, while they ſubſiſt, they are reckoned eſtates for life; becauſe, the time for which they will endure being uncertain, they may by poſſibility laſt for life, if the contingencies upon which they are to determine do not ſooner happen. And, moreover, in caſe an eſtate be granted to a man for his life, generally, it may alſo determine by his *civil* death; as if he enters into a monaſtery, whereby he is dead in law (h): for which reaſon in conveyances the grant is uſually made "for the term of a man's "*natural* life;" which can only determine by his *natural* death. (i).

(d) Co Litt. 42.
(e) *Ibid.*
(f) Co. Litt. 36.
(g) Co. Litt. 42. 3 Rep. 20.
(h) 2 Rep. 48.
(i) See Vol. I. pag. 129.

THE

THE *incidents* to an eſtate for life, are principally the following; which are applicable not only to that ſpecies of tenants for life, which are expreſsly created by deed; but alſo to thoſe which are created by act and operation of law.

1. EVERY tenant for life, unleſs reſtrained by covenant or agreement, may of common right take upon the land demiſed to him reaſonable *eſtovers* (k) or *botes* (l). For he hath a right to the full enjoyment and uſe of the land, and all its profits, during his eſtate therein. But he is not permitted to cut down timber or do other waſte upon the premiſes (m): for the deſtruction of ſuch things, as are not the temporary profits of the tenement, is not neceſſary for the tenant's complete enjoyment of his eſtate; but tends to the permanent and laſting loſs of the perſon entitled to the inheritance.

2. TENANT for life, or his repreſentatives, ſhall not be prejudiced by any ſudden determination of his eſtate, becauſe ſuch determination is contingent and uncertain (n). Therefore if a tenant for his own life ſows the lands, and dies before harveſt, his executors ſhall have the *emblements*, or profits of the crop: for the eſtate was determined by the *act of God*; and it is a maxim in the law, that *actus Dei nemini facit injuriam*. The repreſentatives therefore of the tenant for life ſhall have the emblements, to compenſate for the labour and expenſe of tilling, manuring, and ſowing, the lands; and alſo for the encouragement of huſbandry, which being a public benefit, tending to the increaſe and plenty of proviſions, ought to have the utmoſt ſecurity and privilege that the law can give it. Wherefore, by the feodal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reverſion, was alſo entitled to the profits of the whole year; but, if he died between the beginning of March and the end of Auguſt, the heirs of the tenant received the

(k) See pag. 35.
(l) Co. Litt. 41.
(m) Co. Litt. 53.
(n) *Ibid.* 55.

whole

whole (o). From hence our law of emblements ſeems to have been derived, but with very conſiderable improvements. So it is alſo, if a man be tenant for the life of another, and *ceſtuy que vie*, or he on whoſe life the land is held, dies after the corn ſown, the tenant *pur auter vie* ſhall have the emblements. The ſame is alſo the rule, if a life-eſtate be determined by the *act of law*. Therefore, if a leaſe be made to huſband and wife during coverture, (which gives them a determinable eſtate for life) and the huſband ſows the land, and afterwards they are divorced *a vinculo matrimonii*, the huſband ſhall have the emblements in this caſe; for the ſentence of divorce is the act of law (p). But if an eſtate for life be determined by the tenant's *own act*, (as, by forfeiture for waſte committed; or, if a tenant during widowhood thinks proper to marry) in theſe, and ſimilar caſes, the tenants, having thus determined the eſtate by their own acts, ſhall not be entitled to take the emblements (q). The doctrine of emblements extends not only to corn ſown, but to roots planted, or other annual artificial profit: but it is otherwiſe of fruit-trees, graſs, and the like; which are not planted annually at the expenſe and labour of the tenant, but are either the permanent, or natural, profit of the earth (r). For even when a man plants a tree, he cannot be preſumed to plant it in contemplation of any preſent profit; but merely with a proſpect of its being uſeful to future ſucceſſions of tenants. The advantages alſo of emblements are particularly extended to the parochial clergy by the ſtatute 28 Hen. VIII. c. 11. For all perſons, who are preſented to any eccleſiaſtical benefice, or to any civil office, are conſidered as tenants for their own lives, unleſs the contrary be expreſſed in the form of donation.

3. A THIRD incident to eſtates for life relates to the under-tenants or leſſees. For they have the ſame, nay greater indulgences, than their leſſors, the original tenants for life. The ſame; for the law of eſtovers and emblements, with re-

(o) *Feud. l.* 2. *t.* 28.
(p) 5 Rep. 116.
(q) Co. Litt. 55.
(r) Co. Litt. 55, 56. 1 Roll Abr. 728.

gard

gard to the tenant for life, is alſo law with regard to his under-tenant, who repreſents him and ſtands in his place (s): and greater; for in thoſe places where tenant for life ſhall not have the emblements, becauſe the eſtate determines by his own act, the exception ſhall not reach his leſſee, who is a third perſon. As in the caſe of a woman who holds *durante viduitate*; her taking a huſband is her own act, and therefore deprives her of the emblements: but if ſhe leaſes her eſtate to an under-tenant, who ſows the land, and ſhe then marries, this her act ſhall not deprive the tenant of his emblements, who is a ſtranger and could not prevent her (t). The leſſees of tenants for life had alſo at the common law another moſt unreaſonable advantage; for, at the death of their leſſors the tenants for life, theſe under-tenants might if they pleaſed quit the premiſes, and pay no rent to any body for the occupation of the land ſince the laſt quarter-day, or other day aſſigned for payment of rent (u). To remedy which it is now enacted (v), that the executors or adminiſtrators of tenant for life, on whoſe death any leaſe determined, ſhall recover of the leſſee a rateable proportion of rent, from the laſt day of payment to the death of ſuch leſſor.

II. THE next eſtate for life is of the legal kind, as contradiſtinguiſhed from conventional; *viz.* that of tenant *in tail after poſſibility of iſſue extinct*. This happens, where one is tenant in ſpecial tail, and a perſon, from whoſe body the iſſue was to ſpring, dies without iſſue; or, having left iſſue, that iſſue becomes extinct; in either of theſe caſes the ſurviving tenant in ſpecial tail becomes tenant in tail after poſſibility of iſſue extinct. As, where one has an eſtate to him and his heirs on the body of his preſent wife to be begotten, and the wife dies without iſſue (w); in this caſe the man has an eſtate-tail, which cannot poſſibly deſcend to any one; and therefore the law makes uſe of this long periphraſis, as abſolutely neceſſary to give an adequate idea of his eſtate. For if it had called him barely *tenant in fee-tail ſpecial*, that would

(s) Co. Litt. 55.
(t) Cro. Eliz. 461. 1 Roll. Abr. 727.
(u) 10 Rep. 127.
(v) Stat. 11 Geo. II. c. 19. §. 15.
(w) Litt. §. 32.

not

not have diſtinguiſhed him from others; and beſides he has no longer an eſtate of inheritance, or fee (x), for he can have no heirs, capable of taking *per formam doni*. Had it called him *tenant in tail without iſſue*, this had only related to the preſent fact, and would not have excluded the poſſibility of future iſſue. Had he been ſtiled *tenant in tail without poſſibility of iſſue*, this would exclude time paſt as well as preſent, and he might under this deſcription never have had any poſſibility of iſſue. No definition therefore could ſo exactly mark him out, as this of tenant *in tail after poſſibility of iſſue extinct*, which (with a preciſion peculiar to our own law) not only takes in the poſſibility of iſſue in tail which he once had, but alſo ſtates that this poſſibility is now extinguiſhed and gone.

THIS eſtate muſt be created by the act of God, that is, by the death of that perſon out of whoſe body the iſſue was to ſpring; for no limitation, conveyance, or other human act can make it. For, if the land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii*, they ſhall neither of them have this eſtate, but be barely tenants for life, notwithſtanding the inheritance once veſted in them (y). A poſſibility of iſſue is always ſuppoſed to exiſt, in law, unleſs extinguiſhed by the death of the parties; even though the donees be each of them an hundred years old (z).

THIS eſtate is of an amphibious nature, partaking partly of an eſtate-tail, and partly of an eſtate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail; as, not to be puniſhable for waſte, *&c* (a): or, he is tenant in tail, with many of the reſtrictions of a tenant for life; as, to forfeit his eſtate if he alienes it in fee-ſimple (b): whereas ſuch alienation by tenant in tail, though voidable by the iſſue, is no forfeiture of the eſtate to the reverſioner; who is not concerned in intereſt, till all poſſibility of iſſue be extinct. But, in general, the

(x) 1 Roll. Rep. 184. 11 Rep. 80.
(y) Co. Litt. 28.
(z) Litt. §. 34. Co. Litt. 28.
(a) Co. Litt. 27.
(b) Co. Litt. 28.

law

law looks upon this eſtate as equivalent to an eſtate for life only; and, as ſuch, will permit this tenant to exchange his eſtate with a tenant for life; which exchange can only be made, as we ſhall ſee hereafter, of eſtates that are equal in their nature.

III. TENANT *by the curteſy of England*, is where a man marries a woman ſeiſed of lands or tenements in fee-ſimple or fee-tail; that is, of any eſtate of inheritance; and has by her iſſue, born alive, which was capable of inheriting her eſtate. In this caſe, he ſhall, on the death of his wife, hold the lands for his life, as tenant by the curteſy of England (c).

THIS eſtate, according to Littleton, has its denomination, becauſe it is uſed within the realm of England only; and it is ſaid in the mirrour (d) to have been introduced by King Henry the firſt: but it appears alſo to have been the eſtabliſhed law of Scotland, wherein it was called *curialitas* (e): ſo that probably our word *curteſy* was underſtood to ſignify rather an attendance upon the *lord's court* or *curtis*, (that is, being his vaſal or tenant) than to denote any peculiar favour belonging to this iſland. And therefore it is laid down (f) that, by having iſſue, the huſband ſhall be intitled to do homage to the lord, for the wife's lands, alone. It is likewiſe uſed in Ireland, by virtue of an ordnance of king Henry III (g). It alſo appears (h) to have obtained in Normandy; and was likewiſe uſed among the antient Almains or Germans (i). And yet it is not generally apprehended to have been a conſequence of feodal tenure (k), though I think ſome ſubſtantial feodal reaſons may be given for its introduction. For, if a woman ſeiſed of lands hath iſſue by her huſband, and dies, the huſband is the natural guardian of the child, and as ſuch is in reaſon entitled to the profits of the lands in order to maintain it: and therefore the heir apparent of a

(c) Litt. §. 35, 52.
(d) c. 1. §. 3.
(e) Crag. *l.* 2. *t.* 19. §. 4.
(f) Litt. §. 00. Co. Litt. 30. 67.
(g) *Pat.* 11 *H. III. m.* 30. in 2 Bac. Abr. 659.
(h) *Grand Ceuſtum. c.* 119.
(i) Lindenbrog. *LL. Alman. t.* 92.
(k) Wright. 294.

tenant

tenant by the curteſy could not be in ward to the lord of the fee, during the life of ſuch tenant (l). As ſoon therefore as any child was born, the father began to have a permanent intereſt in the lands, he became one of the *pares curtis*, and was called tenant by the curteſy *initiate*; and this eſtate being once veſted in him by the birth of the child, was not liable to be determined by the ſubſequent death or coming of age of the infant.

THERE are four requiſites neceſſary to make a tenancy by the curteſy; marriage, ſeiſin of the wife, iſſue, and death of the wife (m). 1. The marriage muſt be canonical, and legal. 2. The ſeiſin of the wife muſt be an actual ſeiſin, or poſſeſſion of the lands; not a bare right to poſſeſs, which is a ſeiſin in law, but an actual poſſeſſion, which is a ſeiſin in deed. And therefore a man ſhall not be tenant by the curteſy of a remainder or reverſion. But of ſome incorporeal hereditaments a man may be tenant by the curteſy, though there have been no actual ſeiſin of the wife; as in caſe of an advowſon, where the church has not become void in the life time of the wife, which a man may hold by the curteſy, becauſe it is impoſſible to have had actual ſeiſin of it; and *impotentia excuſat legem* (n). If the wife be an idiot, the huſband ſhall not be tenant by the curteſy of her lands; for the king by prerogative is entitled to them, the inſtant ſhe herſelf has any title: and ſince ſhe never could be rightfully ſeiſed of theſe lands, and the huſband's title depends entirely upon her ſeiſin, the huſband can have no title as tenant by the curteſy (o). 3. The iſſue muſt be born alive. Some have had a notion that it muſt be heard to cry; but that is a miſtake. Crying indeed is the *ſtrongeſt* evidence of its being born alive; but it is not the *only* evidence (p). The iſſue alſo muſt be born during the life of the mother; for, if the mother dies in labour, and the Caeſarean operation is performed, the huſband in this caſe ſhall not be tenant by the cur-

(l) F. N. B. 143.
(m) Co. Litt. 30.
(n) *Ibid.* 29.
(o) Co. Litt. 30. Plowd. 263.
(p) Dyer. 25. 8 Rep. 34.

teſy:

teſy: becauſe, at the inſtant of the mother's death, he was clearly not entitled, as having had no iſſue born, but the land deſcended to the child, while he was yet in his mother's womb; and the eſtate, being once veſted, ſhall not afterwards be taken from him (q). In gavelkind lands, a huſband may be tenant by the curteſy without having any iſſue (r). But in general there muſt be iſſue born; and ſuch iſſue muſt alſo be capable of inheriting the mother's eſtate (s). Therefore if a woman be tenant in tail *male*, and hath only a *daughter* born, the huſband is not thereby entitled to be tenant by the curteſy; becauſe ſuch iſſue female can never inherit the eſtate in tail male (t). And this ſeems to be the true reaſon, why the huſband cannot be tenant by the curteſy of any lands of which the wife was not actually ſeiſed: becauſe, in order to intitle himſelf to ſuch eſtate, he muſt have begotten iſſue that he may be heir to the wife; but no one, by the ſtanding rule of law, can be heir to the anceſtor of any land, whereof the anceſtor was not actually ſeiſed; and therefore, as the huſband hath never begotten any iſſue that can be heir to thoſe lands, he ſhall not be tenant of them by the curteſy (u). And hence we may obſerve, with how much nicety and conſideration the old rules of law were framed; and how cloſely they are connected and interwoven together, ſupporting, illuſtrating, and demonſtrating one another. The time when the iſſue was born is immaterial, provided it were during the coverture: for, whether it were born before or after the wife's ſeiſin of the lands, whether it be living or dead at the time of the ſeiſin, or at the time of the wife's deceaſe, the huſband ſhall be tenant by the curteſy (w). The huſband by the birth of the child becomes (as was before obſerved) tenant by the curteſy *initiate* (x), and may do many acts to charge the lands; but his eſtate is not *conſummate* till the death of the wife; which is the fourth and laſt requiſite to make a complete tenant by the curteſy (y).

(q) Co. Litt. 29.
(r) *Ibid.* 30.
(s) Litt. §. [redacted].
(t) Co. Litt. 29.
(u) *Ibid.* 40.
(w) *Ibid.* 29.
(x) Co. Litt. 30.
(y) *Ibid.*

IV. TENANT

IV. TENANT in *dower* is where the huſband of a woman is ſeiſed of an eſtate of inheritance, and dies; in this caſe the wife ſhall have the third part of all the lands and tenements whereof he was ſeiſed during the coverture, to hold to herſelf for the term of her natural life (z).

DOWER is called in Latin by the foreign juriſts *doarium*, but by Bracton and our Engliſh writers *dos*; which among the Romans ſignified the marriage portion, which the wife brought to her huſband; but with us is applied to ſignify this kind of eſtate, to which the civil law, in its original ſtate, had nothing that bore a reſemblance: nor indeed is there any thing in general more different, than the regulation of landed property according to the Engliſh and Roman laws. Dower out of lands ſeems alſo to have been unknown in the early part of our Saxon conſtitution; for, in the laws of king Edmond (a), the wife is directed to be ſupported wholly out of the perſonal eſtate. Afterwards, as may be ſeen in gavelkind tenure, the widow became entitled to a conditional eſtate in one half of the lands, with a proviſo that ſhe remained chaſte and unmarried (b); as is uſual alſo in copyhold dowers, or free bench. Yet ſome (c) have aſcribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feodal reaſon for its invention, ſince it was not a part of the pure, primitive, ſimple law of feuds, but was firſt of all introduced into that ſyſtem (wherein it was called *triens*, *tertia* (d), and *dotalitium*) by the emperor Frederick the ſecond (e); who was cotemporary with our king Henry III. It is poſſible therefore that it might be with us the relic of a Daniſh cuſtom: ſince, according to the hiſtorians of that country, dower was introduced into Denmark by Swein, the father of our Canute the great, out of gratitude to the Daniſh ladies, who ſold all their

(z) Litt. §. 36.
(a) Wilk. 73.
(b) Somner. Gavelk. 51. Co. Litt. 33. Bro. *Dower*. 70.
(c) Wright. 192.
(d) Crag. *l.* 2. *t.* 22. §. 9.
(e) *Ibid.*

jewels to ranſom him when taken priſoner by the Vandals(f). However this be, the reaſon, which our law gives for adopting it, is a very plain and a ſenſible one; for the ſuſtenance of the wife, and the nurture and education of the younger children (g).

IN treating of this eſtate, let us, firſt, conſider, *who* may be endowed; ſecondly, of *what* ſhe may be endowed; thirdly, the manner *how* ſhe ſhall be endowed; and, fourthly, how dower may be *barred* or prevented.

1. WHO may be endowed. She muſt be the actual wife of the party at the time of his deceaſe. If ſhe be divorced *a vinculo matrimonii*, ſhe ſhall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (h). But a divorce *a menſa et thoro* only doth not deſtroy the dower (i); no, not even for adultery itſelf, by the common law (k). Yet now by the ſtatute Weſtm. 2. (l) if a woman elopes from her huſband, and lives with an adulterer, ſhe ſhall loſe her dower, unleſs her huſband be voluntarily reconciled to her. It was formerly held, that the wife of an idiot might be endowed, though the huſband of an idiot could not be tenant by the curteſy (m): but as it ſeems to be at preſent agreed upon principles of ſound ſenſe and reaſon, that an idiot cannot marry, being incapable of conſenting to any contract, this doctrine cannot now take place. By the antient law the wife of a perſon attainted of treaſon or felony could not be endowed; to the intent, ſays Staunforde (n), that, if the love of a man's own life cannot reſtrain him from ſuch atrocious acts, the love of his wife and children may: though Britton (o) gives it another turn; *viz.* that it is preſumed the wife was privy to her huſband's crime. However, the ſtatute 1 Edw. VI. c. 12. abated the rigor of the common law in this particular, and

(f) Mod. Un. Hiſt. xxxii. 91.
(g) Bract. *l.* 2. *c.* 39. Co. Litt. 30.
(h) Bract. *l.* 2. *c.* 39. §. 4.
(i) Co. Litt. 32.
(k) Yet, among the antient Goths, an adultereſs was puniſhed by the loſs of her *dotalitii et trientis ex bonis mobilibus viri.* (Stiernh. *l.* 3. *c.* 2.)
(l) 13 Edw. I. c. 34.
(m) Co. Litt. 31.
(n) P. C. b. 3. *c.* 3.
(o) *c.* 110.

allowed

allowed the wife her dower. But a ſubſequent ſtatute (p) revived this ſeverity againſt the widows of traitors, who are now barred of their dower, but not the widows of felons. An alien alſo cannot be endowed, unleſs ſhe be queen conſort; for no alien is capable of holding lands (q). The wife muſt be above nine years old at her huſband's death, otherwiſe ſhe ſhall not be endowed (r): though in Bracton's time the age was indefinite, and dower was then only due, "*ſi* "*uxor poſſit dotem promereri, et virum ſuſtinere* (s)."

2. WE are next to enquire, of what a wife may be endowed. And ſhe is now by law entitled to be endowed of all lands and tenements, of which her huſband was ſeiſed in fee-ſimple or fee-tail at any time during the coverture; and of which any iſſue, which ſhe might have had, might by poſſibility have been heir (t). T'refore if a man, ſeiſed in fee-ſimple, hath a ſon by his firſt wife, and after marries a ſecond wife, ſhe ſhall be endowed of his lands; for her iſſue might by poſſibility have been heir, on the death of the ſon by the former wife. But, if there be a donee in ſpecial tail, who holds lands to him and the heirs of his body begotten on Jane his wife; though Jane may be endowed of theſe lands, yet if Jane dies, and he marries a ſecond wife, that ſecond wife ſhall never be endowed of the lands entailed; for no iſſue, that ſhe could have, could by any poſſibility inherit them (u). A ſeiſin in law of the huſband will be as effectual as a ſeiſin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the huſband's title to an actual ſeiſin, as it is in the huſband's power to do with regard to the wife's lands: which is one reaſon why he ſhall not be tenant by the curteſy, but of ſuch lands whereof the wife, or he himſelf in her right, was actually ſeiſed in deed (w). The ſeiſin of the huſband, for a tranſitory inſtant only, when the ſame act which gives him the eſtate conveys it

(p) 5 & 6 Edw. VI. *c.* 11.
(q) Co. Litt. 31.
(r) Litt. §. 36.
(s) *l.* 2. *c.* 9. §. 3.
(t) Litt. §. 36. 53.
(u) *Ibid.* §. 53.
(w) Co. Litt. 31.

alſo out of him again, (as where by a fine land is granted to a man, and he immediately renders it back by the ſame fine) ſuch a ſeiſin will not intitle the wife to dower (x): for the land was merely *in tranſitu*, and never reſted in the huſband. But, if the land abides in him for a ſingle moment, it ſeems that the wife ſhall be endowed thereof (y). And, in ſhort, a widow may be endowed of all her huſband's lands, tenements, and hereditaments, corporeal or incorporeal, under the reſtrictions before-mentioned; unleſs there be ſome ſpecial reaſon to the contrary. Thus, a woman ſhall not be endowed of a caſtle, built for defence of the realm (z): nor of a common without ſtint; for, as the heir would then have one portion of this common, and the widow another, and both without ſtint, the common would be doubly ſtocked (a). Copyhold eſtates alſo are not liable to dower, being only eſtates at the lord's will; unleſs by the ſpecial cuſtom of the manor, in which caſe it is uſually called the widow's free-bench (b). But, where dower is allowable, it matters not, though the huſband aliene the lands during the coverture; for he alienes them liable to dower (c).

3. NEXT, as to the manner in which a woman is to be endowed. There are now ſubſiſting four ſpecies of dower, the fifth, mentioned by Littleton (d), *de la plus belle*, having been aboliſhed together with the military tenures, of which it was a conſequence. 1. Dower by the *common law*; or that which is before deſcribed. 2. Dower by particular *cuſtom* (e); as that the wife ſhall have half the huſband's lands, or in ſome places the whole, or in ſome only a quarter. 3. Dower *ad oſtium eccleſiae* (f): which is where tenant in fee-ſimple

(x) Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.

(y) This doctrine was extended very far by a jury in Wales, where the father and ſon were both hanged in one cart, but the ſon was ſuppoſed to have ſurvived the father, by appearing to ſtruggle longeſt; whereby he became ſeiſed of an eſtate by ſurvivorſhip, in conſequence of which ſeiſin his widow had a verdict for her dower. (Cro. Eliz. 503.)

(z) Co. Litt. 31. 3 Lev. 401.

(a) Co. Litt. 32. 1 Jon. 315.

(b) 4 Rep. 22.

(c) Co. Litt. 32.

(d) §. 48, 49.

(e) Litt. §. 37.

(f) *Ibid.* §. 39.

of

of full age, openly at the church door, where all marriages were formerly celebrated, and affiance made, and (ſir Edward Coke in his tranſlation adds) troth plighted between them, doth endow his wife with the whole, or ſuch quantity as he ſhall pleaſe, of his lands; at the ſame time ſpecifying and aſcertaining the ſame; on which the wife, after her huſband's death, may enter without farther ceremony. 4. Dower *ex aſſenſu patris* (g); which is only a ſpecies of dower *ad oſtium eccleſiae*, made when the huſband's father is alive, and the ſon by his conſent, expreſsly given, endows his wife with parcel of his father's lands. In either of theſe caſes, they muſt (to prevent frauds) be made (h) *in facie eccleſiae et ad oſtium eccleſiae; non enim valent facta in lecto mortali, nec in camera, aut alibi ubi clandeſtina fuere conjugia.*

IT is curious to obſerve the ſeveral revolutions which the doctrine of dower has undergone, ſince its introduction into England. It ſeems firſt to have been of the nature of the dower in gavelkind, before-mentioned; *viz.* a moiety of the huſband's lands, but forfeitable by incontinency or a ſecond marriage. By the famous charter of Henry I, this condition, of widowhood and chaſtity, was only required in caſe the huſband left any iſſue (i): and afterwards we hear no more of it. Under Henry the ſecond, according to Glanvil (k) the dower *ad oſtium eccleſiae* was the moſt uſual ſpecies of dower; and here, as well as in Normandy (l), it was binding upon the wife, if by her conſented to at the time of marriage. Neither, in thoſe days of feodal rigour, was the huſband allowed to endow her *ad oſtium eccleſiae* with more than the third part of the lands whereof he was then ſeiſed, though he might endow her with leſs; leſt by ſuch liberal endowments the lord ſhould be defrauded of his wardſhips and other feodal profits (m). But if no ſpecific dotation was made

(g) Litt. §. 40

(h) Bracton. *l.* 2. *c.* 39. §. 4.

(i) *Si mortuo viro uxor ejus remanſerit, et ſine liberis fuerit, dotem ſuam habebit;—ſi vero uxor cum liberis remanſerit, dotem quidem habebit, dum corpus ſuum legitime ſervaverit.* (*Cart. Hen. I. A. D.* 1101. Introd. to great charter, *edit. Oxon.* pag. iv.)

(k) *l.* 6. *c.* 1, & 2.

(l) *Gr. Couſtum. c.* 101.

(m) Bract. *l.* 2. *c.* 39. §. 6.

at the church porch, then ſhe was endowed *by the common law* of the third part (which was called her *dos rationabilis*) of ſuch lands and tenements, as the huſband was ſeiſed of at the time of the eſpouſals, and no other: unleſs he ſpecially engaged before the prieſt to endow her of his future acquiſitions (n): and, if the huſband had no lands, an endowment in goods, chattels, or money, at the time of eſpouſals, was a bar of any dower (o) in lands which he afterwards acquired (p). In king John's *magna carta*, and the firſt charter of Henry III (q) no mention is made of any alteration of the common law, in reſpect of the lands ſubject to dower: but in thoſe of 1217, and 1224, it is particularly provided, that a widow ſhall be intitled for her dower to the third part of *all* ſuch lands as the huſband had held in his life time (r): yet, in caſe of a ſpecific endowment of leſs *ad oſtium eccleſiae*, the widow had ſtill no power to waive it after her huſband's death. And this continued to be law, during the reigns of Henry III and Edward I (s). In Henry IV's time it was denied to be law, that a woman can be endowed of her huſband's goods and chattels (t): and under Edward IV, Littleton lays it down expreſsly,

(n) *De queſtu ſuo.* (Glanv. *ibid.*) *de terris acquiſitis et acquirendis.* (Bract. *Ibid.*

(o) Glanv. *c.* 2.

(p) When ſpecial endowments were made *ad oſtium eccleſiae*, the huſband, after affiance made, and troth plighted, uſed to declare with what ſpecific lands he meant to endow his wife, *(quod dotat eam de tali manerio cum pertinentiis, &c.* Bract. *ibid.)* and therefore in the old York ritual (Seld. *Ux. Hebr. l.* 2. *c.* 27.) there is, at this part of the matrimonial ſervice, the following rubric; "*ſacerdos* "*interroget dotem mulieris; et, ſi ter-* "*ra ei in dotem detur, tunc dicatur* "*pſalmus iſte, &c.*" When the wife was endowed generally *(ubi quis uxorem ſuam dotaverit in generali, de omnibus terris et tenementis*; Bract. *ibid.)* the huſband ſeems to have ſaid, "with all my lands and tenements I "thee endow;" and then they all became liable to her dower. When he endowed her with perſonalty only, he uſed to ſay, "with all my worldly "goods (or, as the Saliſbury ritual has "it, *with all my worldly chatel)* I thee "endow;" which intitled the wife to her thirds, or *pars rationabilis*, of his perſonal eſtate, which is provided for by *magna carta*, *cap.* 26. and will be farther treated of in the concluding chapter of this book: though the retaining this laſt expreſſion in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which ſhe acquires during coverture, out of her huſband's perſonalty.

(q) *A. D.* 1216. *c.* 7. *edit. Oxon.*

(r) *Aſſignetur autem ei pro dote ſua tertia pars totius terrae mariti ſui quae ſua fuit in vita ſua, niſi de minori dotata fuerit ad oſtium eccleſiae. c.* 7. *(Ibid.)*

(s) Bract. *ubi ſupr.* Britton. *c.* 101, 102. Flet. *l.* 5. *c.* 23. §. 11, 12.

(t) *P.* 7. *Hen. IV.* 13, 14.

that

that a woman may be endowed *ad oſtium eccleſiae* with more than a third part (u); and ſhall have her election, after her huſband's death, to accept ſuch dower, or refuſe it and betake herſelf to her dower at common law (w). Which ſtate of uncertainty was probably the reaſon, that theſe ſpecific dowers, *ad oſtium eccleſiae* and *ex aſſenſu patris*, have ſince fallen into total diſuſe.

I PROCEED therefore to conſider the method of endowment, or aſſigning dower, by the common law, which is now the only uſual ſpecies. By the old law, grounded on the feodal exactions, a woman could not be endowed without a fine paid to the lord: neither could ſhe marry again without his licence; leſt ſhe ſhould contract herſelf, and ſo convey part of the feud to the lord's enemy (x). This licence the lords took care to be well paid for; and, it ſeems, would ſometimes force the dowager to a ſecond marriage, in order to gain the fine. But, to remedy theſe oppreſſions, it was provided, firſt by the chater of Henry I (y), and afterwards by *magna carta* (z), that the widow ſhould pay nothing for her marriage, nor ſhall be diſtreined to marry afreſh, if ſhe chooſes to live without a huſband; but ſhall not however marry againſt the conſent of the lord: and farther, that nothing ſhall be taken for aſſignment of the widow's dower, but that ſhe ſhall remain in her huſband's capital manſion-houſe for forty days after his death, during which time her dower ſhall be aſſigned. Theſe forty days are called the widow's *quarentine*; a term made uſe of in law to ſignify the number of forty days, whether applied to this occaſion, or any other (a). The particular lands to be held in dower, muſt be aſſigned (b) by the heir of the huſband, or his guardian; not only for the ſake of notoriety, but alſo to entitle the lord of the fee to demand his ſervices of the heir, in reſpect of the lands ſo held. For the heir by this entry be-

(u) §. 39. F. N. B. 150.
(w) §. 41.
(x) Mir. *c.* 1. §. 3.
(y) *ubi ſupra.*
(z) *cap.* 7.
(a) It ſignifies, in particular, the forty days, which perſons coming from infected countries are obliged to wait, before they are permitted to land in England.
(b) Co. Litt. 34, 35.

comes tenant thereof to the lord, and the widow is immediate tenant to the heir, by a kind of ſubinfeudation or under-tenancy, completed by this inveſtiture or aſſignment: which tenure may ſtill be created, notwithſtanding the ſtatute of *quia emptores*, becauſe the heir parts not with the fee-ſimple, but only with an eſtate for life. If the heir or his guardian do not aſſign her dower within the term of quarentine, or do aſſign it unfairly, ſhe has her remedy at law, and the ſheriff is appointed to aſſign it (c). If the thing of which ſhe is endowed be diviſible, her dower muſt be ſet out by metes and bounds; but, if it be indiviſible, ſhe muſt be endowed ſpecially; as, of the third preſentation to a church, the third toll-diſh of a mill, the third part of the profits of an office, the third ſheaf of tithe, and the like (d).

UPON preconcerted marriages, and in eſtates of conſiderable conſequence, tenancy in dower happens very ſeldom: for, the claim of the wife to her dower at the common law diffuſing itſelf ſo extenſively, it became a great clog to alienations, and was otherwiſe inconvenient to families. Wherefore, ſince the alteration of the antient law reſpecting dower *ad oſtium eccleſiae*, which hath occaſioned the intire diſuſe of that ſpecies of dower, jointures have been introduced in their ſtead, as a bar to the claim at common law. Which leads me to enquire, laſtly,

4. How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treaſon of her huſband, and other diſabilities before-mentioned, but alſo by detaining the title deeds, or evidences of the eſtate from the heir; until ſhe reſtores them (e): and, by the ſtatute of Gloceſter (f), if a dowager alienes the land aſſigned her for dower, ſhe forfeits it *ipſo facto*, and the heir may recover it by action. A woman alſo may be barred of her dower, by levying a fine or ſuffering a recovery of the lands, during her cover-

(c) Co. Litt. 34, 35.
(d) *Ibid.* 32.
(e) Co. Litt. 39.
(f) 6 Edw. I. c. 7.

ture.

ture (g). But the moſt uſual method of barring dowers is by jointures, as regulated by the ſtatute 27 Hen. VIII. c. 10.

A JOINTURE, which ſtrictly ſpeaking ſignifies a joint eſtate, limited to both huſband and wife, but in common acceptation extends alſo to a ſole eſtate, limited to the wife only, is thus defined by ſir Edward Coke (h); "a compe-"tent livelyhood of freehold for the wife, of lands and tene-"ments; to take effect, in profit or poſſeſſion, preſently "after the death of the huſband; for the life of the wife at "leaſt." This deſcription is framed from the purview of the ſtatute 27 Hen. VIII. c. 10. before-mentioned; commonly called the ſtatute of *uſes*, of which we ſhall ſpeak fully hereafter. At preſent, I have only to obſerve, that, before the making of that ſtatute, the greateſt part of the land of England was conveyed to uſes; the property or poſſeſſion of the ſoil being veſted in one man, and the *uſe*, or profits thereof, in another; whoſe directions, with regard to the diſpoſition thereof, the former was in conſcience obliged to follow, and might be compelled by a court of equity to obſerve. Now, though a huſband had the *uſe* of lands in abſolute fee-ſimple, yet the wife was not intitled to any dower therein, he not being *ſeiſed* thereof: wherefore it became uſual, on marriage, to ſettle by expreſs deed ſome ſpecial eſtate to the uſe of the huſband and his wife, for their lives, in joint-tenancy or jointure; which ſettlement would be a proviſion for the wife in caſe ſhe ſurvived her huſband. At length the ſtatute of uſes ordained, that ſuch as had the *uſe* of lands, ſhould, to all intents and purpoſes, be reputed and taken to be abſolutely *ſeiſed* and poſſeſſed of the ſoil itſelf. In conſequence of which legal ſeiſin, all wives would have become dowable of ſuch lands as were held to the uſe of their huſbands, and alſo entitled at the ſame time to any ſpecial lands that might be ſettled in jointure; had not the ſame ſtatute provided, that upon making ſuch an eſtate in jointure to the wife before marriage, ſhe ſhall be for ever precluded from her dower (i). But then theſe four requi-

(g) Pig. of recov. 66. (h) 1 Inſt. 36. (i) 4 Rep. 1, 2.

ſites

ſites muſt be punctually obſerved. 1. The jointure muſt take effect immediately on the death of the huſband. 2. It muſt be for her own life at leaſt, and not *pur auter vie*, or for any term of years, or other ſmaller eſtate. 3. It muſt be made to herſelf, and no other in truſt for her. 4. It muſt be made, and ſo in the deed particularly expreſſed to be, in ſatisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, ſhe has her election after her huſband's death, as in dower *ad oſtium eccleſiae*, and may either accept it, or refuſe it and betake herſelf to her dower at common law; for ſhe was not capable of conſenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointreſs is evicted, or turned out of poſſeſſion, ſhe ſhall then (by the proviſions of the ſame ſtatute) have her dower *pro tanto* at the common law (k).

THERE are ſome advantages attending tenants in dower that do not extend to jointreſſes; and ſo, *vice verſa*, jointreſſes are in ſome reſpects more privileged than tenants in dower. Tenant in dower by the old common law is ſubject to no tolls nor taxes; and hers is almoſt the only eſtate on which, when derived from the king's debtor, the king cannot diſtrein for his debt; if contracted during the coverture (l). But, on the other hand, a widow may enter at once, without any formal proceſs, on her jointure land; as ſhe alſo might have done on dower *ad oſtium eccleſiae*, which a

(k) Theſe ſettlements, previous to marriage, ſeem to have been in uſe among the antient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account. "*Dotem non uxor marito, ſed uxori* "*meritus affert: interſunt parentes et* "*propinqui, et munera probant.*" (*de mor. Germ. c.* 18.) And Caeſar, (*de bello Gallico, l.* 6. *c.* 18.) has given us the terms of a marriage ſettlement among the Gauls, as nicely calculated as any modern jointure. "*Viri, quan-*" *tas pecunias ab uxoribus dotis nomine* "*acceperunt, tantas ex ſuis bonis,* "*aeſtimatione facta, cum dotibus com-*" *municant. Hujus omnis pecuniae con-*" *junctim ratio habetur, fructuſque* "*ſervantur. Uter eorum vita ſupera-*" *rit, ad eum pars utriuſque cum fruc-*" *tibus ſuperiorum temporum perve-*" *nit.*" The Dauphin's commentator on Caeſar ſuppoſes that this Gauliſh cuſtom was the ground of the new regulations made by Juſtinian (*Nov.* 97.) with regard to the proviſion for widows among the Romans: but ſurely there is as much reaſon to ſuppoſe, that it gave the hint for our ſtatutable jointures.

(l) Co. Litt. 31. a. F. N. B. 150.

jointure

jointure in many points reſembles; and the reſemblance was ſtill greater, while that ſpecies of dower continued in its primitive ſtate: whereas no ſmall trouble, and a very tedious method of proceeding, is neceſſary to compel a legal aſſignment of dower (m). And, what is more, though dower be forfeited by the treaſon of the huſband, yet lands ſettled in jointure remain unimpeached to the widow (n). Wherefore ſir Edward Coke very juſtly gives it the preference, as being more ſure and ſafe to the widow, than even dower *ad oſtium eccleſiae*, the moſt eligible ſpecies of any.

(m) Co. Lit. 36.

(n) Co. Litt. 37.

CHAPTER

CHAPTER THE NINTH.

OF ESTATES, LESS THAN FREEHOLD.

OF eſtates, that are leſs than freehold, there are three ſorts; 1. Eſtates for years: 2. Eſtates at will: 3. Eſtates by ſufferance.

I. AN eſtate for *years* is a contract for the poſſeſſion of lands or tenements, for ſome determinate period: and it happens where a man letteth them to another for the term of a certain number of years, agreed upon between the leſſor and the leſſee (a), and the leſſee enters thereon (b). If the leaſe be but for half a year, or a quarter, or any leſs time, this leſſee is reſpected as a tenant for years, and is ſtiled ſo in ſome legal proceedings; a year being the ſhorteſt term which the law in this caſe takes notice of (c). And this may, not improperly, lead us into a ſhort explanation of the diviſion and calculation of time by the Engliſh law.

THE ſpace of a year is a determinate and well-known period, conſiſting commonly of 365 days: for, though in biſſextile

(a) We may here remark, once for all, that the terminations of "—or" and "—ee" obtain, in law, the one an active, the other a paſſive ſignification; the former uſually denoting the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a leaſe is denominated the leſſor; and he to whom it is granted the leſſee. (Litt §. 57,

(b) *Ibid.* 58.

(c) *Ibid.* 67.

or

or leap-years it conſiſts properly of 366, yet by the ſtatute 21 Hen. III. the increaſing day in the leap-year, together with the preceding day, ſhall be accounted for one day only. That of a month is more ambiguous: there being, in common uſe, two ways of calculating months; either as lunar, conſiſting of twenty-eight days, the ſuppoſed revolution of the moon, thirteen of which make a year; or, as calendar months, of unequal lengths, according to the Julian diviſion in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unleſs otherwiſe expreſſed; not only becauſe it is always one uniform period, but becauſe it falls naturally into a quarterly diviſion by weeks. Therefore a leaſe for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelve-month" in the ſingular number, it is good for the whole year (d). For herein the law recedes from its uſual calculation, becauſe the ambiguity between the two methods of computation ceaſes; it being generally underſtood that by the ſpace of time called thus, in the ſingular number, a twelvemonth, is meant the whole year, conſiſting of one ſolar revolution. In the ſpace of a day all the twenty-four hours are uſually reckoned; the law generally rejecting all fractions of a day, in order to avoid diſputes (e). Therefore, if I am bound to pay money on any certain day, I diſcharge the obligation if I pay it before twelve o'clock at night; after which the following day commences. But to return to eſtates for years.

THESE eſtates were originally granted to mere farmers or huſbandmen, who every year rendered ſome equivalent in money, proviſions, or other rent, to the leſſors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent intereſt granted them, not determinable at the will of the lord. And yet their poſſeſſion was eſteemed of ſo little conſequence, that they were rather conſidered as the bailiffs or ſervants of the lord, who were to receive and account for the profits at a ſettled price,

(d) 6 Rep. 61. (e) Co. Litt. 135.

than

than as having any property of their own. And therefore they were not allowed to have a freehold eſtate: but their intereſt (ſuch as it was) veſted after their deaths in their executors, who were to make up the accounts of their teſtator with the lord, and his other creditors, and were intitled to the ſtock upon the farm. The leſſee's eſtate might alſo, by the antient law, be at any time defeated, by a common recovery ſuffered by the tenant of the freehold (f); which annihilated all leaſes for years then ſubſiſting, unleſs afterwards renewed by the recoveror, whoſe title was ſuppoſed ſuperior to his by whom thoſe leaſes were granted.

WHILE eſtates for years were thus precarious, it is no wonder that they were uſually very ſhort, like our modern leaſes upon rack rent; and indeed we are told (g) that by the antient law no leaſes for more than forty years were allowable, becauſe any longer poſſeſſion (eſpecially when given without any livery declaring the nature and duration of the eſtate) might tend to defeat the inheritance. Yet this law, if ever it exiſted, was ſoon antiquated: for we may obſerve, in Madox's collection of antient inſtruments, ſome leaſes for years of a pretty early date, which conſiderably exceed that period (h); and long terms, for three hundred years at leaſt, were certainly in uſe in the time of Edward III (i), and probably of Edward I (k). But certainly, when by the ſtatute 21 Hen. VIII. c. 15. the termor (that is, he who is intitled to the term of years) was protected againſt theſe fictitious recoveries, and his intereſt rendered ſecure and permanent, long terms began to be more frequent than before; and were afterwards extenſively introduced, being found extremely convenient for family ſettlements and mortgages: continuing ſubject, however, to the ſame rules of ſucceſſion, and with the ſame inferiori-

(f) Co. Litt. 46.

(g) Mirror. c. 2. §. 27. Co. Litt. 45, 46.

(h) Madox *Formulare Anglican.* n°. 239. *fol.* 140. Demiſe for eighty years, 21 Ric II..... *Ibid.* n°. 245. *fol.* 146. for the like term, *A.D.* 1429. ..... *Ibid.* n°. 248. *fol.* 148. for fifty years, 7 Edw. IV.

(i) 32 Aſſ. pl. 6.

(k) Stat. of mortmain, 7 Edw. I.

ty

ty to freeholds, as when they were little better than tenancies at the will of the landlord.

EVERY eſtate which muſt expire at a period certain and prefixed, by whatever words created, is an eſtate for years. And therefore this eſtate is frequently called a term, *terminus*, becauſe its duration or continuance is bounded, limited, and determined: for every ſuch eſtate muſt have a certain beginning, and certain end (l). But *id certum eſt, quod certum reddi poteſt:* therefore if a man make a leaſe to another for ſo many years as J. S. ſhall name, it is a good leaſe for years (m); for though it is at preſent uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this eſtate, it begins from the making, or delivery, of the leaſe (n). A leaſe for ſo many years as J. S. ſhall live, is void from the beginning (o); for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the leaſe. And the ſame doctrine holds, if a parſon make a leaſe of his glebe for ſo many years as he ſhall continue parſon of Dale; for this is ſtill more uncertain. But a leaſe for twenty or more years, if J. S. ſhall ſo long live, or if he ſhall ſo long continue parſon, is good (p): for there is a certain period fixed, beyond which it cannot laſt, though it may determine ſooner, on the death of J. S. or his ceaſing to be parſon there.

WE have before remarked, and endeavoured to aſſign the reaſon of, the inferiority in which the law places an eſtate for years, when compared with an eſtate for life, or an inheritance: obſerving, that an eſtate for life, even if it be *pur auter vie*, is a freehold; but that an eſtate for a thouſand years is only a chattel, and reckoned part of the perſonal eſtate (q). Hence it follows, that a leaſe for years may be made to commence *in futuro*, though a leaſe for life cannot. As, if I grant lands to Titius to hold from Michaelmas,

(l) Co. Litt. 45. (n) Co. Litt. 46. (p) Co. Litt. 45.
(m) 6 Rep. 35. (o) *Ibid.* 45. (q) *Ibid.* 46.

next

next for twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no eſtate of freehold can commence *in futuro*; becauſe it cannot be created at common law without livery of ſeiſin or corporal poſſeſſion of the land: and corporal poſſeſſion cannot be given of an eſtate now, which is not to commence now, but hereafter (r). And, becauſe no livery of ſeiſin is neceſſary to a leaſe for years, ſuch leſſee is not ſaid to be *ſeiſed*, or to have true legal ſeiſin, of the lands. Nor indeed does the bare leaſe veſt any eſtate in the leſſee; but only gives him a right of entry on the tenement, which right is called his *intereſt in the term*, or *intereſſe termini*: but when he has actually ſo entered, and thereby accepted the grant, the eſtate is then and not before veſted in him, and he is *poſſeſſed*, not properly of the land, but of the term of years (s); the poſſeſſion or ſeiſin of the *land* remaining ſtill in him who hath the freehold. Thus the word, *term*, does not merely ſignify the term ſpecified in the leaſe, but the eſtate alſo and intereſt that paſſes by that leaſe: and therefore the *term* may expire, during the continuance of the *time*; as by ſurrender, forfeiture, and the like. For which reaſon, if I grant a leaſe to A for the term of three years, and after the expiration of the ſaid *term* to B for ſix years, and A ſurrenders or forfeits his leaſe at the end of *one* year, B's intereſt ſhall immediately take effect: but if the remainder had been to B from and after the expiration of the ſaid *three years*, or from and after the expiration of the ſaid *time*, in this caſe B's intereſt will not commence till the time is fully elapſed, whatever may become of A's term (t).

TENANT for term of years hath incident to, and inſeparable from his eſtate, unleſs by ſpecial agreement, the ſame eſtovers, which we formerly obſerved (u) that tenant for life was entitled to, that is to ſay, houſe-bote, fire-bote, plough-bote, and hay-bote (w): terms which have been already explained (x).

(r) 5 Rep. 94.
(s) Co. Litt. 46.
(t) Co. Litt. 45.
(u) pag. 122.
(w) Co. Litt. 45.
(x) pag 35.

WITH

WITH regard to emblements, or profits of land ſowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midſummer for ten years, and in the laſt year he ſows a crop of corn, and it is not ripe and cut before midſummer, the end of his term, the landlord ſhall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to ſow what he never could reap the profits of (y). But where the leaſe for years depends upon an uncertainty; as, upon the death of the leſſor, being himſelf only tenant for life, or being a huſband ſeiſed in right of his wife; or if the term of years be determinable upon a life or lives; in all theſe caſes, the eſtate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, ſhall have the emblements in the ſame manner, that a tenant for life or his executors ſhall be entitled thereto (z). Not ſo, if it determine by the act of the party himſelf; as if tenant for years does any thing that amounts to a forfeiture: in which caſe the emblements ſhall go to the leſſor, and not to the leſſee, who hath determined his eſtate by his own default (a).

II. THE ſecond ſpecies of eſtates not freehold are eſtates at *will*. An eſtate at will is where lands and tenements are lett by one man to another, to have and to hold at the will of the leſſor; and the tenant by force of this leaſe obtains poſſeſſion (b). Such tenant hath no certain indefeaſible eſtate, nothing that can be aſſigned by him to any other; for that the leſſor may determine his will, and put him out whenever he pleaſes. But every eſtate at will is at the will of both parties, landlord and tenant, ſo that either of them may determine his will, and quit his connexions with the other at his own pleaſure (c). Yet this muſt be underſtood with ſome reſtriction. For, if the tenant at will ſows his land, and the landlord be-

(y) Litt. §. 68.
(z) Co. Litt. 56.
(a) *Ibid.* 55.
(b) Litt. §. 68.
(c) Co. Litt. 55.

fore the corn is ripe, or before it is reaped, puts him out, yet the tenant ſhall have the emblements, and free ingreſs, egreſs, and regreſs, to cut and carry away the profits (d). And this for the ſame reaſon, upon which all the caſes of emblements turn; *viz.* the point of uncertainty: ſince the tenant could not poſſibly know when his landlord would determine his will, and therefore could make no proviſion againſt it; and having ſown the land, which is for the good of the public, upon a reaſonable preſumption, the law will not ſuffer him to be a loſer by it. But it is otherwiſe, and upon reaſon equally good, where the tenant himſelf determines the will: for in this caſe the landlord ſhall have the profits of the land (e).

What act does, or does not, amount to a determination of the will on either ſide, has formerly been matter of great debate in our courts. But it is now, I think, ſettled, that (beſides the expreſs determination of the leſſor's will, by declaring that the leſſee ſhall hold no longer; which muſt either be made upon the land (f), or notice muſt be given to the leſſee) (g) the exertion of any act of ownerſhip by the leſſor, as entering upon the premiſes and cutting timber (h) taking a diſtreſs for rent and impounding them thereon (i), or making a feoffment, or leaſe for years of the land to commence immediately (k); any act of deſertion by the leſſee, as aſſigning his eſtate to another, or committing waſte, which is an act inconſiſtent with ſuch a tenure (l); or, which is *inſtar omnium*, the death or outlawry, of either leſſor or leſſee (m); puts an end to or determines the eſtate at will.

The law is however careful, that no ſudden determination of the will by one party ſhall tend to the manifeſt and unforeſeen prejudice of the other. This appears in the caſe of

(d) Co. Litt. 56.
(e) *Ibid.* 55.
(f) *Ibid.*
(g) 1. Ventr. 248.
(h) Co. Litt. 55.
(i) *Ibid.* 57.
(k) 1 Roll Abr. 860. 2 Lev. 88.
(l) Co. Litt. 55.
(m) 5 Rep. 116. Co. Litt. 57. 62.

emblements

emblements before-mentioned; and, by a parity of reaſon, the leſſee after the determination of the leſſor's will, ſhall have reaſonable ingreſs and egreſs to fetch away his goods and utenſils (n). And if rent be payable quarterly or half-yearly, and the leſſee determines the will, the rent ſhall be paid to the end of the current quarter or half-year (o). And, upon the ſame principle, courts of law have of late years leaned as much as poſſible againſt conſtruing demiſes, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year ſo long as both parties pleaſe, eſpecially where an annual rent is reſerved: in which caſe they will not ſuffer either party to determine the tenancy even at the end of the year, without reaſonable notice to the other.

THERE is one ſpecies of eſtates at will, that deſerves a more particular regard than any other; and that is, an eſtate held by copy of court roll; or, as we uſually call it, a *copyhold* eſtate. This, as was before obſerved (p), was in its original and foundation nothing better than a mere eſtate at will. But, the kindneſs and indulgence of ſucceſſive lords of manors having permitted theſe eſtates to be enjoyed by the tenants and their heirs according to particular cuſtoms eſtabliſhed in their reſpective diſtricts; therefore, though they ſtill are held at the will of the lord, and ſo are in general expreſſed in the court rolls to be, yet that will is qualified, reſtrained, and limited, to be exerted according to the cuſtom of the manor. This cuſtom, being ſuffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and aſcertained by the cuſtom to be the ſame, and no other, that has time out of mind been exerciſed and declared by his anceſtors. A copyhold tenant is therefore now full as properly a tenant by the cuſtom, as a tenant at will, the cuſtom having ariſen from a ſeries of uniform wills. And therefore it is rightly obſerved by Calthorpe (q), that "copyholders and cuſtomary tenants

(n) Litt. §. 69.
(o) Salk. 414. 1 Sid. 339.
(p) pag. 93.
(q) on copyholds, 51. 54.

 "differ

"differ not ſo much in nature as in name; for although ſome "be called copyholders, ſome cuſtomary, ſome tenants by "the virge, ſome baſe tenants, ſome bond tenants, and ſome "by one name and ſome by another, yet do they all agree "in ſubſtance and kind of tenure: all the ſaid lands are hol- "den in one general kind, that is, by cuſtom and continu- "ance of time; and the diverſity of their names doth not "alter the nature of their tenure."

Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the cuſtom of the manor; which cuſtoms differ as much as the humour and temper of the reſpective antient lords, (from whence we may account for their great variety) ſuch tenant, I ſay, may have, ſo far as the cuſtom warrants, any other of the eſtates or quantities of intereſt, which we have hitherto conſidered, or may hereafter conſider, to hold united with this cuſtomary eſtate at will. A copyholder may, in many manors, be tenant in fee-ſimple, in fee tail, for life, by the curteſy, in dower, for years, at ſufferance, or on condition: ſubject however to be deprived of theſe eſtates upon the concurrence of thoſe circumſtances which the will of the lord promulged by immemorial cuſtom, has declared to be a forfeiture or abſolute determination of thoſe intereſts; as in ſome manors the want of iſſue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none of theſe intereſts amount to freehold; for the freehold of the whole manor abides always in the lord only (r), who hath granted out the uſe and occupation, but not the corporal ſeiſin or true poſſeſſion, of certain parts and parcels thereof, to theſe his cuſtomary tenants at will.

The reaſon of originally granting out this complicated kind of intereſt, ſo that the ſame man ſhall, with regard to the ſame land, be at one and the ſame time tenant in fee-ſimple and alſo tenant at the lord's will, ſeems to have ariſen from the nature of villenage tenure; in which a grant of any eſtate

(r) Litt. §. 81. 2 Inſt. 325.

of

of freehold, or even for years abſolutely, was an immediate enfranchiſement of the villein (s). The lords therefore, though they were willing to enlarge the intereſt of their villeins, by granting them eſtates which might endure for their lives, or ſometimes be deſcendible to their iſſue, yet did not care to manumit them entirely; and for that reaſon it ſeems to have been contrived, that a power of reſumption at the will of the lord ſhould be annexed to theſe grants, whereby the tenants were ſtill kept in a ſtate of villenage, and no freehold at all was conveyed to them in their reſpective lands: and of courſe, as the freehold of all lands muſt neceſſarily reſt and abide ſomewhere, the law ſuppoſes it to continue and remain in the lord. Afterwards, when theſe villeins became modern copyholders, and had acquired by cuſtom a ſure and indefeaſible eſtate in their lands, on performing the uſual ſervices, but yet continued to be ſtiled in their admiſſions tenant at the will of the lord,—the law ſtill ſuppoſed it an abſurdity to allow, that ſuch as were thus nominally tenants at will could have any freehold intereſt: and therefore continued, and ſtill continues to determine, that the freehold of lands ſo holden abides in the lord of the manor, and not in the tenant; for though he *really* holds to him and his heirs for ever, yet he is alſo *ſaid* to hold at another's will. But, with regard to certain other copyholders, of free or privileged tenure, which are derived from the antient tenants in villeinſocage (t), and are not ſaid to hold *at the will of the lord*, but only *according to the cuſtom of the manor*, there is no ſuch abſurdity in allowing them to be capable of enjoying a freehold intereſt; and therefore the law doth not ſuppoſe the freehold of ſuch lands to reſt in the lord of whom they are holden, but in the tenants themſelves (u); who are allowed to have a freehold *intereſt*, though not a freehold *tenure*.

HOWEVER, in common caſes, copyhold eſtates are ſtill ranked (for the reaſons above-mentioned) among tenancies at will;

(s) Mirr. c. 2. §. 28. Litt. §. 204, 5, 6.

(t) See pag. 98, *&c.*

(u) Fitzh. *Abr. tit. corone.* 310. *cuſtom*, 12. Bro. *Abr. tit. cuſtom.* 2. 17. *tenant per copie.* 22. 9 Rep. 76. Co. Litt. 59. Co. Copyh. §. 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.

will; though cuſtom, which is the life of the common law, has eſtabliſhed a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himſelf, in the tenements holden of the manor: nay ſometimes even ſuperior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an abſolute freeholder in point of intereſt, and in other reſpects, particularly in the clearneſs and ſecurity of his title, to be frequently in a better ſituation.

III. AN eſtate at *ſufferance*, is where one comes into poſſeſſion of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a leaſe for a year, and, after the year is expired, continues to hold the premiſes without any freſh leave from the owner of the eſtate. Or, if a man maketh a leaſe at will, and dies, the eſtate at will is thereby determined; but if the tenant continueth poſſeſſion, he is tenant at ſufferance (w). But no man can be tenant at ſufferance againſt the king, to whom no *laches* or neglect, in not entering and ouſting the tenant, is ever imputed by law: but his tenant, ſo holding over, is conſidered as an abſolute intruder (x). But in the caſe of a ſubject, this eſtate may be deſtroyed whenever the true owner ſhall make an actual entry on the lands and ouſt the tenant; for, before entry, he cannot maintain an action of treſpaſs againſt the tenant by ſufferance, as he might againſt a ſtranger (y): and the reaſon is, becauſe the tenant being once in by a lawful title, the law (which preſumes no wrong in any man) will ſuppoſe him to continue upon a title equally lawful; unleſs the owner of the land by ſome public and avowed act, ſuch as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

THUS ſtands the law, with regard to tenants by ſufferance; and landlords are obliged in theſe caſes to make formal entries upon their lands (z), and recover poſſeſſion by the

(w) Co. Litt. 57.
(x) *Ibid.*
(y) *Ibid.*
(z) 5 Mod. 384.

legal

legal proceſs of ejectment: and at the utmoſt, by the common law, the tenant was bound to account for the profits of the land ſo by him detained. But now, by ſtatute 4 Geo. II. c. 28. in caſe any tenant for life or years, or other perſon claiming under or by colluſion with ſuch tenant, ſhall wilfully hold over after the determination of the term, and demand made in writing for recovering the poſſeſſion of the premiſes, by him to whom the remainder or reverſion thereof ſhall belong; ſuch perſon, ſo holding over, ſhall pay, for the time he continues, at the rate of double the yearly value of the lands ſo detained. This has almoſt put an end to the practice of tenancy by ſufferance, unleſs with the tacit conſent of the owner of the tenement.

CHAPTER THE TENTH.

OF ESTATES UPON CONDITION.

BESIDES the ſeveral diviſions of eſtates, in point of intereſt, which we have conſidered in the three preceding chapters, there is alſo another ſpecies ſtill remaining, which is called an eſtate *upon condition*; being ſuch whoſe exiſtence depends upon the happening or not happening of ſome uncertain event, whereby the eſtate may be either originally created, or enlarged, or finally defeated (a). And theſe conditional eſtates I have choſen to reſerve till laſt, becauſe they are indeed more properly qualifications of other eſtates, than a diſtinct ſpecies of themſelves: ſeeing that any quantity of intereſt, a fee, a freehold, or a term of years, may depend upon theſe proviſional reſtrictions. Eſtates then upon condition, thus underſtood, are of two ſorts: 1. Eſtates upon condition *implied:* 2. Eſtates upon condition *expreſſed:* under which laſt may be included, 3. Eſtates held in *vadio*, *gage*, or *pledge:* 4. Eſtates by *ſtatute merchant* or *ſtatute ſtaple:* 5. Eſtates held by *elegit*.

I. ESTATES upon condition implied in law, are where a grant of an eſtate has a condition annexed to it inſeparably, from its eſſence and conſtitution, although no condition be expreſſed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a ſecret condition, that the grantee ſhall duly execute his office (b) on breach

(a) Co. Litt. 201. (b) Litt. §. 378.

of

of which condition it is lawful for the grantor, or his heirs, to ouſt him, and grant it to another perſon (c). For an office, either public or private, may be forfeited by *miſ-uſer* or *non-uſer*; both of which are breaches of this implied condition. 1. By *miſ-uſer*, or abuſe; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *non-uſer*, or neglect; which in public offices, that concern the adminiſtration of juſtice, or the commonwealth, is of itſelf a direct and immediate cauſe of forfeiture: but non-uſer of a private office is no cauſe of forfeiture, unleſs ſome ſpecial damage is proved to be occaſioned thereby (d). For in the one caſe delay muſt neceſſarily be occaſioned in the affairs of the public, which require a conſtant attention; but, private offices not requiring ſo regular and unremitted a ſervice, the temporary neglect of them is not neceſſarily productive of miſchief; upon which account ſome ſpecial loſs muſt be proved, in order to vacate theſe. Franchiſes alſo, being equal privileges in the hands of a ſubject, are held to be granted on the ſame condition of making a proper uſe of them; and therefore they may be loſt and forfeited, like offices, either by abuſe or by neglect (e).

UPON the ſame principle proceed all the forfeitures which are given by law of life eſtates and others; for any acts done by the tenant himſelf, that are incompatible with the eſtate which he holds. As if tenants for life or years enfeoff a ſtranger in fee-ſimple: this is, by the common law, a forfeiture of their ſeveral eſtates; being a breach of the condition which the law annexes thereto, *viz*, that they ſhall not attempt to create a greater eſtate than they themſelves are entitled to (f). So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, becauſe their eſtate is determined by the breach of the condition, "that they ſhall "not commit felony," which the law tacitly annexes to every feodal donation.

(c) Litt. §. 379.
(d) Co. Litt. 233.
(e) 9 Rep. 50.
(f) Co. Litt. 215.

II. AN

II. An eſtate on condition expreſſed in the grant itſelf, is where an eſtate is granted, either in fee-ſimple or otherwiſe, with an expreſs qualification annexed, whereby the eſtate granted ſhall either commence, be enlarged, or be defeated, upon performance or breach of ſuch qualification or condition (g). Theſe conditions are therefore either *precedent*, or *ſubſequent*. Precedent are ſuch as muſt happen or be performed before the eſtate can veſt or be enlarged; ſubſequent are ſuch, by the failure or non-performance of which an eſtate already veſted may be defeated. Thus, if an eſtate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no eſtate (h) is veſted in A. Or, if a man grant to his leſſee for years, that upon payment of a hundred marks within the term he ſhall have the fee, this alſo is a condition precedent, and the fee-ſimple paſſeth not till the hundred marks be paid (i). But if a man grant an eſtate in fee-ſimple, reſerving to himſelf and his heirs a certain rent; and that, if ſuch rent be not paid at the times limited, it ſhall be lawful for him and his heirs to re-enter, and avoid the eſtate; in this caſe the grantee and his heirs have an eſtate upon condition ſubſequent, which is defeaſible if the condition be not ſtrictly performed (k). To this claſs may alſo be referred all baſe fees, and fee-ſimples conditional at the common law (l). Thus an eſtate to a man and his heirs, *tenants of the manor of Dale*, is an eſtate on condition that he and his heirs continue tenants of that manor. And ſo, if a perſonal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the ſtatute of Weſtminſter the ſecond, it remains, as at common law, a fee-ſimple on condition that the grantee has heirs of his body. Upon the ſame principle depend all the determinable eſtates of freehold, which we mentioned in the eighth chapter; as *durante viduitate*, *&c:* theſe are eſtates upon condition that the grantees do not marry, and the like. And, on the breach of any

(g) Co. Litt. 201.
(h) Show. Parl. Caſ. 83, *&c.*
(i) Co. Litt. 217.
(k) Litt. §. 325.
(l) See pag. 109, 110, 111.

of

of theſe ſubſequent conditions by the failure of theſe contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing ſole; the eſtates which were reſpectively veſted in each grantee are wholly determined and void.

A DISTINCTION is however made between a *condition in deed* and a *limitation*, which Littleton (m) denominates alſo a *condition in law*. For when an eſtate is ſo expreſsly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the eſtate is to fail, this is denominated a *limitation*: as when land is granted to a man, *ſo long as* he is parſon of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he ſhall have made 500*l.* and the like (n). In ſuch caſes the eſtate determines as ſoon as the contingency happens, (when he ceaſes to be parſon, marries a wife, or has received the 500*l.*) and the next ſubſequent eſtate, which depends upon ſuch determination, becomes immediately veſted, without any act to be done by him who is next in expectancy. But when an eſtate is, ſtrictly ſpeaking, upon *condition in deed* (as if granted expreſsly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *ſo that* the grantee continues unmarried, or *provided* he goes to York, &c.) (o) the law permits it to endure beyond the time when ſuch contingency happens, unleſs the grantor or his heirs or aſſigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the eſtate (p). But, though ſtrict words of condition be uſed in the creation of the eſtate, yet if on breach of the condition the eſtate be limited over to a third perſon, and does not immediately revert to the grantor or his repreſentatives, (as if an eſtate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs) this the law conſtrues to be a limitation

(m) § 380. 1 Inſt. 234.
(n) 10 Rep. 41.
(o) *Ibid.* 42.
(p) Litt. §. 347. Stat. 32 Hen. VIII. c. 34.

and

and not a condition (q): becauſe, if it were a condition, then, upon the breach thereof, only A or his repreſentatives could avoid the eſtate by entry, and ſo D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the eſtate of B determines, and that of D commences, the inſtant that the failure happens. So alſo, if a man by his will deviſes land to his heir at law, on condition that he pays a ſum of money, and for non-payment deviſes it over, this ſhall be conſidered as a limitation; otherwiſe no advantage could be taken of the non-payment, for none but the heir himſelf could have entered for a breach of condition (r).

IN all theſe inſtances, of limitations or conditions ſubſequent, it is to be obſerved, that ſo long as the condition, either expreſs or implied, either in deed or in law, remains unbroken, the grantee may have an eſtate of freehold, provided the eſtate upon which ſuch condition is annexed be in itſelf of a freehold nature; as if the original grant expreſs either an eſtate of inheritance, or for life. For the breach of theſe conditions being contingent and uncertain, this uncertainty preſerves the freehold (s); becauſe the eſtate is capable to laſt for ever, or at leaſt for the life of the tenant, ſuppoſing the condition to remain unbroken. But where the eſtate is at the utmoſt a chattel intereſt, which muſt determine at a time certain, and may determine ſooner, (as a grant for ninety nine years, provided A, B, and C, and the ſurvivor of them, ſhall ſo long live) this ſtill continues a mere chattel, and is not, by its uncertainty, ranked among eſtates of freehold.

THESE expreſs conditions, if they be *impoſſible* at the time of their creation, or afterwards become impoſſible by the act of God or the act of the feoffor himſelf, or if they be *contrary to law*, or *repugnant* to the nature of the eſtate, are void. In any of which caſes, if they be conditions *ſubſequent*,

(q) 1 Ventr. 202.
(r) Cro. Eliz. 205. 1 Roll. Abr. 411.
(s) Co. Litt. 42.

that

that is, to be performed after the eſtate is veſted, the eſtate ſhall become abſolute in the tenant. As if a feoffment be made to a man in fee-ſimple, on condition, that unleſs he goes to Rome in twenty four hours; or unleſs he marries with Jane S. by ſuch a day; (within which time the woman dies, or the feoffor marries her himſelf) or unleſs he kills another; or in caſe he alienes in fee; then and in any of ſuch caſes the eſtate ſhall be vacated and determine: here the condition is void, and the eſtate made abſolute in the feoffee. For he hath by the grant the eſtate veſted in him, which ſhall not be defeated afterwards by a condition either impoſſible, illegal, or repugnant (t). But if the condition be *precedent*, or to be performed before the eſtate veſts, as a grant to a man that, if he kills another, or goes to Rome in a day, he ſhall have an eſtate in fee; here, the void condition being precedent, the eſtate which depends thereon is alſo void, and the grantee ſhall take nothing by the grant: for he hath no eſtate until the condition be performed (u).

THERE are ſome eſtates defeaſible upon condition ſubſequent, that require a more peculiar notice. Such are

III. ESTATES held *in vadio*, in *gage*, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge, or *mortgage*.

VIVUM *vadium*, or living pledge, is when a man borrows a ſum (ſuppoſe 200 *l.*) of another; and grants him an eſtate, as, of 20 *l. per annum*, to hold till the rents and profits ſhall repay the ſum ſo borrowed. This is an eſtate conditioned to be void, as ſoon as ſuch ſum is raiſed. And in this caſe the land or pledge is ſaid to be living: it ſubſiſts, and ſurvives the debt; and, immediately on the diſcharge of that, reſults back to the borrower (w). But *mortuum vadium*, a dead pledge, or *mortgage*, (which is much more common than the other) is where a man borrows of another a ſpecific ſum *(e. g.* 200 *l.)*

(t) Co. Litt. 206.
(u) *Ibid.*
(w) *Ibid.* 205.

and

and grants him an eſtate in fee, on condition that if he, the mortgagor, ſhall repay the mortgagee the ſaid ſum of 200 *l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the eſtate ſo granted in pledge; or, as is now the more uſual way, that the mortgagee ſhall reconvey the eſtate to the mortgagor: in this caſe the land, which is ſo put in pledge, is, by law in caſe of non-payment at the time limited, for ever dead and gone from the mortgagor; and the mortgagee's eſtate in the lands is then no longer conditional, but abſolute. But, ſo long as it continues conditional, that is, between the time of lending the money, and the time allotted for payment, the mortgagee is called tenant in mortgage (x). But, as it was formerly a doubt (y), whether, by taking ſuch eſtate in fee, it did not become liable to the wife's dower, and other incumbrances of the mortgagee (though that doubt has been long ago over-ruled by our courts of equity) (z) it therefore became uſual to grant only a long term of years, by way of mortgage; with condition to be void on re-payment of the mortgage-money; which courſe has been ſince continued, principally becauſe on the death of the mortgagee ſuch term becomes veſted in his perſonal repreſentatives, who alone are intitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

As ſoon as the eſtate is created, the mortgagee may immediately enter on the lands; but is liable to be diſpoſſeſſed, upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the uſual way is to agree that the mortgagor ſhall hold the land till the day aſſigned for payment; when, in caſe of failure, whereby the eſtate becomes abſolute, the mortgagee may enter upon it and take poſſeſſion, without any poſſibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now for ever dead. But here again the courts of equity interpoſe; and, though a mortgage be thus forfeited,

(x) Litt. §. 332.
(y) *Ibid.* §. 357. Cro. Car. 191.
(z) Hardr. 466.

and

and the eſtate abſolutely veſted in the mortgagee at the common law, yet they will conſider the real value of the tenements compared with the ſum borrowed. And, if the eſtate be of greater value than the money lent thereon, they will allow the mortgagor at any reaſonable time to recall or redeem his eſtate; paying to the mortgagee his principal, intereſt and expences: for otherwiſe, in ſtrictneſs of law, an eſtate worth 1000 *l.* might be forfeited for non-payment of 100 *l.* or a leſs ſum. This reaſonable advantage, allowed to mortgagors, is called the *equity of redemption:* and this enables a mortgagor to call on the mortgagee, who has poſſeſſion of his eſtate, to deliver it back and account for the rents and profits received, on payment of his whole debt and intereſt; thereby turning the *mortuum* into a kind of *vivum vadium.* But, on the other hand, the mortgagee may either compel the ſale of the eſtate, in order to get the whole of his money immediately; or elſe call upon the mortgagor to redeem his eſtate preſently, or, in default thereof, to be for ever *foreclоſed* from redeeming the ſame; that is, to loſe his equity of redemption without poſſibility of re-call. And alſo, in ſome caſes of fraudulent mortgages (a), the fraudulent mortgagor forfeits all equity of redemption whatſoever. It is not therefore uſual for mortgagees to take poſſeſſion of the mortgaged eſtate, unleſs where the ſecurity is precarious, or ſmall; or where the mortgagor neglects even the payment of intereſt: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands, in the nature of a pledge, or the *pignus* of the Roman law: whereas, while it remains in the hands of the mortgagor, it more reſembles their *hypotheca*, which was where the poſſeſſion of the thing pledged remained with the debtor (b). But, by ſtatute 7 Geo. II. c. 20. after payment or tender by the mortgagor of principal, intereſt, and coſts, the mortgagee can maintain no ejectment; but may be compelled to re-aſſign his ſecurities. In Glanvil's time, when the univerſal method of

(a) Stat. 4 & 5 W & M. c. 16.

(b) *Pignoris appellatione eam proprie rem contineri dicimus, quae ſimul etiam traditur creditori. At eam, quae ſine traditione nuda conventione tenetur. proprie hypothecae appellatione contineri dicimus. Inſt. l. 4. t. 6. §. 7.*

conveyance

conveyance was by livery of ſeiſin or corporal tradition of the lands, no gage or pledge of lands was good unleſs poſſeſſion was alſo delivered to the creditor; "*ſi non ſequatur, ipſius va-*"*dii traditio, curia domini regis hujuſmodi privatas conventi-*"*ones tueri non ſolet:*" for which the reaſon given is, to prevent ſubſequent and fraudulent pledges of the ſame land; "*cum in tali caſu poſſit eadem res pluribus aliis creditoribus*"*tum prius tum poſterius invadiari* (c)". And the frauds which have ariſen, ſince the exchange of theſe public and notorious conveyances for more private and ſecret bargains, have well evinced the wiſdom of our antient law.

IV. A FOURTH ſpecies of eſtates, defeaſible on condition ſubſequent, are thoſe held by *ſtatute merchant*, and *ſtatute ſtaple*; which are very nearly related to the *vivum vadium* before-mentioned, or eſtate held till the profits thereof ſhall diſcharge a debt liquidated or aſcertained. For both the ſtatute merchant and ſtatute ſtaple are ſecurities for money; the one entered into purſuant to the ſtatute 13 Edw. I, *de mercatoribus*, and thence called a ſtatute merchant; the other purſuant to the ſtatute 27 Edw. III. c. 9. before the mayor of the ſtaple, that is to ſay, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns (d), and thence this ſecurity is called a ſtatute ſtaple. They are both, I ſay, ſecurities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be ſatisfied: and during ſuch time as the creditor ſo holds the lands, he is tenant by ſtatute merchant or ſtatute ſtaple. There is alſo a ſimilar ſecurity, the recognizance in the nature of a ſtatute ſtaple, which extends the benefit of this mercantile tranſaction to all the king's ſubjects in general, by virtue of the ſtatute 23 Hen. VIII. c. 6.

V. ANOTHER ſimilar conditional eſtate, created by operation of law, for ſecurity and ſatisfaction of debts is called an eſtate

(c) *l.* 10. *c.* 8.

(d) See Book I. ch. 8.

by

by *elegit*. What an *elegit* is, and why ſo called, will be explained in the third part of theſe commentaries. At preſent I need only mention, that it is the name of a writ, founded on the ſtatute (e) of Weſtm. 2. by which, after a plaintiff has obtained judgment for his debt at law, the ſheriff gives him poſſeſſion of one half of the defendant's lands and tenements, to be held, occupied, and enjoyed, until his debt and damages are fully paid: and, during the time he ſo holds them, he is called tenant by *elegit*. It is eaſy to obſerve, that this is alſo a mere conditional eſtate, defeaſible as ſoon as the debt is levied. But it is remarkable, that the feodal reſtraints of alienating lands, and charging them with the debts of the owner, were ſoftened much earlier and much more effectually for the benefit of trade and commerce, than for any other conſideration. Before the ſtatute of *quia emptores* (f), it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the ſtatute therefore of Weſtm. 2. permits only ſo much of them to be affected by the proceſs of law, as a man was capable of alienating by his own deed. But by the ſtatute *de mercatoribus* (paſſed in the ſame year) (g) the *whole* of a man's lands was liable to be pledged in a ſtatute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

I SHALL conclude what I had to remark on theſe eſtates, by ſtatute merchant, ſtatute ſtaple, and *elegit*, with the obſervation of ſir Edward Coke (h). "Theſe tenants have "uncertain intereſts in lands and tenements, and yet they "have but chattels and no freeholds;" (which makes them an exception to the general rule) "becauſe though they "may hold an eſtate of inheritance, or for life, *ut liberum* "*tenementum*, until their debt be paid; yet it ſhall go to "their excutors: for *ut* is ſimilitudinary; and though, to "recover their eſtates, they ſhall have the ſame remedy (by "aſſiſe) as a tenant of the freehold ſhall have, yet it is but

(e) 13 Edw. I. c. 18.
(f) 18 Edw. I.
(g) 13 Edw. I.
(h) 1 Inſt. 42, 43.

"the ſimilitude of a freehold, and *nullum ſimile eſt idem.*" This indeed only proves them to be chattel intereſts, becauſe they go to the executors, which is inconſiſtent with the nature of a freehold: but it does not aſſign the reaſon why theſe eſtates, in contradiſtinction to other uncertain intereſts, ſhould veſt in the executors of the tenant, and not the heir; which is probably owing to this: that, being a ſecurity and remedy provided for perſonal debts owing to the deceaſed, to which debts the executor is intitled, the law has therefore thus directed their ſucceſſion; as judging it reaſonable, from a principle of natural equity, that the ſecurity and remedy ſhould be veſted in them, to whom the debts if recovered would belong. And, upon the ſame principle, if lands be deviſed to a man's executor, until out of their profits the debts due from the teſtator be diſcharged, this intereſt in the lands ſhall be a chattel intereſt, and on the death of ſuch executor go to *his* executors (i): becauſe they, being liable to pay the original teſtator's debts, ſo far as his aſſets will extend, are in reaſon intitled to poſſeſs that fund, out of which he has directed them to be paid.

(i) Co. Litt. 42.

CHAPTER THE ELEVENTH.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

HITHERTO we have conſidered eſtates ſolely with regard to their duration, or the *quantity of intereſt* which the owners have therein. We are now to conſider them in another view; with regard to the *time of their enjoyment*, when the actual pernancy of the profits (that is, the taking, perception, or receipt, of the rents and other advantages ariſing therefrom) begins. Eſtates therefore, with reſpect to this conſideration, may either be in *poſſeſſion*, or in *expectancy*: and of expectancies there are two ſorts; one created by act of the parties, called a *remainder*; the other by act of law, and called a *reverſion*.

I. OF eſtates in *poſſeſſion*, (which are ſometimes called eſtates *executed*, whereby a preſent intereſt paſſes to and reſides in the tenant, not depending on any ſubſequent circumſtance or contingency, as in the caſe of eſtates *executory*) there is little or nothing peculiar to be obſerved. All the eſtates we have hitherto ſpoken of are of this kind; for, in laying down general rules, we uſually apply them to ſuch eſtates as are then actually in the tenant's poſſeſſion. But the doctrine of eſtates in expectancy contains ſome of the niceſt and moſt abſtruſe learning in the Engliſh law. Theſe will therefore require a minute diſcuſſion, and demand ſome degree of attention.

II. An eſtate then in remainder may be defined to be, an eſtate limited to take effect and be enjoyed after another eſtate is determined. As if a man ſeiſed in fee-ſimple granteth lands to A for twenty years, and, after the determination of the ſaid term, then to B and his heirs for ever: here A is tenant for years, remainder to B in fee. In the firſt place an eſtate for years is created or carved out of the fee, and given to A; and the reſidue or remainder of it is given to B. But both theſe intereſts are in fact only one eſtate; the preſent term of years, and the remainder afterwards, when added together, being equal only to one eſtate in fee (a). They are indeed different *parts*, but they conſtitute only one *whole*: they are carved out of one and the ſame inheritance: they are both created, and may both ſubſiſt, together; the one in poſſeſſion, the other in expectancy. So if land be granted to A for twenty years, and, after the determination of the ſaid term, to B for life; and, after the determination of B's eſtate for life, it be limited to C and his heirs for ever: this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now here the eſtate of inheritance undergoes a diviſion into three portions: there is firſt A's eſtate for years carved out of it; and after that B's eſtate for life; and then the whole that remains is limited to C and his heirs. And here alſo the firſt eſtate, and both the remainders, for life and in fee, are one eſtate only; being nothing but parts or portions of one entire inheritance: and if there were an hundred remainders, it would ſtill be the ſame thing; upon a principle grounded on mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence alſo it is eaſy to collect, that no remainder can be limited after the grant of an eſtate in fee-ſimple (b); becauſe a fee-ſimple is the higheſt and largeſt eſtate, that a ſubject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the eſtate: a remainder therefore, which is only a portion, or reſiduary *part*, of the eſtate, cannot be reſerved after the whole is diſpoſed of. A particular eſtate, with all the

(a) Co. Litt. 143. (b) Plowd. 29. Vaugh. 269.

remainders

remainders expectant thereon, is only one fee-ſimple; as 40 *l.* is part of 100 *l.* and 60 *l.* is the remainder of it; wherefore, after a fee-ſimple once veſted, there can no more be a remainder limited thereon, than after the whole 100 *l.* is appropriated there can be any reſidue ſubſiſting.

THUS much being premiſed, we ſhall be the better enabled to comprehend the rules that are laid down by law to be obſerved in the creation of remainders, and the reaſons upon which thoſe rules are founded.

1. AND, firſt, there muſt neceſſarily be ſome particular eſtate, precedent to the eſtate in remainder (c). As, an eſtate for years to A, remainder to B for life; or, an eſtate for life to A, remainder to B in tail. This precedent eſtate is called the *particular* eſtate, as being only a ſmall part, or *particula*, of the inheritance; the reſidue or remainder of which is granted over to another. The neceſſity of creating this preceding particular eſtate, in order to make a good remainder, ariſes from this plain reaſon: that *remainder* is a relative expreſſion, and implies that ſome part of the thing is previouſly diſpoſed of: for, where the whole is conveyed at once, there cannot poſſibly exiſt a remainder; but the intereſt granted, whatever it be, will be an eſtate in poſſeſſion.

AN eſtate created to commence at a diſtant period of time, without any intervening eſtate, is therefore properly no remainder: it is the whole of the gift, and not a reſiduary part. And ſuch future eſtates can only be made of chattel intereſts, which were conſidered in the light of mere contracts by the antient law (d), to be executed either now or hereafter, as the contracting parties ſhould agree: but an eſtate of freehold muſt be created to commence immediately. For it is an antient rule of the common law, that no eſtate of freehold can be created to commence *in futuro*; but it ought to take effect preſently, either in poſſeſſion or remainder (e): becauſe at common law no freehold in lands

(c) Co Litt. 49. Plowd. 25.
(d) Raym. 151.
(e) 5 Rep. 94.

could paſs without livery of ſeiſin; which muſt operate either immediately, or not at all. It would therefore be contradictory, if an eſtate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate poſſeſſion. Therefore, though a leaſe to A for ſeven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs for ever, from the end of three years, next enſuing, is void. So that when it is intended to grant an eſtate of freehold, whereof the enjoyment ſhall be deferred till a future time, it is neceſſary to create a previous particular eſtate, which may ſubſiſt till that period of time is completed; and for the grantor to deliver immediate poſſeſſion of the land to the tenant of this particular eſtate, which is conſtrued to be giving poſſeſſion to him in remainder, ſince his eſtate and that of the particular tenant are one and the ſame eſtate in law. As, where one leaſes to A for three years, with remainder to B in fee, and makes livery of ſeiſin to A; here by the livery the freehold is immediately created, and veſted in B, during the continuance of A's term of years. The whole eſtate paſſes at once from the grantor to the grantees, and the remainder-man is ſeiſed of his remainder at the ſame time that the termor is poſſeſſed of his term. The enjoyment of it muſt indeed be deferred till hereafter; it is to all intents and purpoſes an eſtate commencing *in praeſenti*, though to be occupied and enjoyed *in futuro*.

As no remainder can be created, without ſuch a precedent particular eſtate, therefore the particular eſtate is ſaid to *ſupport* the remainder. But a leaſe at will is not held to be ſuch a particular eſtate, as will ſupport a remainder over (f). For an eſtate at will is of a nature ſo ſlender and precarious, that it is not looked upon as a portion of the inheritance; and a portion muſt firſt be taken out of it, in order to conſtitute a remainder. Beſides, if it be a freehold remainder, livery of ſeiſin muſt be given at the time of its creation; and the entry of the grantor, to do this, determines the eſtate at will in the

(f) 8 Rep. 75.

very

very inſtant in which it is made (g): or, if it be a chattel intereſt, though perhaps it might operate as a *future contract*, if the tenant for years be a party to the deed of creation, yet it is void by way of *remainder*: for it is a ſeparate independent contract, diſtinct from the precedent eſtate at will; and every remainder muſt be part of one and the ſame eſtate, out of which the preceding particular eſtate is taken (h). And hence it is generally true, that if the particular eſtate is void in its creation, or by any means is defeated afterwards, the remainder ſupported thereby ſhall be defeated alſo (i): as where the particular eſtate is an eſtate for the life of a perſon not *in eſſe* (k); or an eſtate for life upon condition, on breach of which condition the grantor enters and avoids the eſtate (l); in either of theſe caſes the remainder over is void.

2. A SECOND rule to be obſerved is this; that the remainder muſt commence or paſs out of the grantor at the time of the creation of the particular eſtate (m). As, where there is an eſtate to A for life, with remainder to B in fee; here B's remainder in fee paſſes from the grantor at the ſame time that ſeiſin is delivered to A of his life eſtate in poſſeſſion. And it is this, which induces the neceſſity at common law of livery of ſeiſin being made on the particular eſtate, whenever a *freehold* remainder is created. For, if it be limited even on an eſtate for years, it is neceſſary that the leſſee for years ſhould have livery of ſeiſin, in order to convey the freehold from and out of the grantor; otherwiſe the remainder is void (n). Not that the livery is neceſſary to ſtrengthen the eſtate for years; but, as livery of the land is requiſite to convey the freehold, and yet cannot be given to him in remainder without infringing the poſſeſſion of the leſſee for years, therefore the law allows ſuch livery, made to the tenant of the particular eſtate, to relate and enure to him in remainder, as both are but one eſtate in law (o).

(g) Dyer. 18.
(h) Raym. 151.
(i) Co. Litt. 298.
(k) 2 Roll. Abr. 415.
(l) 1 Jon. 58.
(m) Litt. §. 671. Plows. 25.
(n) Litt. §. 60.
(o) Co. Litt. 49.

3. A THIRD rule reſpecting remainders is this; that the remainder muſt veſt in the grantee during the continuance of the particular eſtate, or *eo inſtanti* that it determines (p). As, if A be tenant for life, remainder to B in tail; here B's remainder is veſted in him, at the creation of the particular eſtate to A for life: or, if A and B be tenants for their joint lives, remainder to the ſurvivor in fee; here, though during their joint lives the remainder is veſted in neither, yet on the death of either of them, the remainder veſts inſtantly in the ſurvivor: wherefore both theſe are good remainders. But, if an eſtate be limited to A for life, remainder to the eldeſt ſon of B in tail, and A dies before B hath any ſon; here the remainder will be void, for it did not veſt in any one during the continuance, nor at the determination, of the particular eſtate: and, even ſuppoſing that B ſhould afterwards have a ſon, he ſhall not take by this remainder; for, as it did not veſt at or before the end of the particular eſtate, it can never veſt at all, but is gone for ever (q). And this depends upon the principle before laid down, that the precedent particular eſtate and the remainder are one eſtate in law; they muſt therefore ſubſiſt and be *in eſſe* at one and the ſame inſtant of time, either during the continuance of the firſt eſtate, or at the very inſtant when that determines, ſo that no other eſtate can poſſibly come between them. For there can be no intervening eſtate between the particular eſtate, and the remainder ſupported thereby (r): the thing ſupported muſt fall to the ground, if once its ſupport be ſevered from it.

IT is upon theſe rules, but principally the laſt, that the doctrine of *contingent* remainders depends. For remainders are either *veſted* or *contingent*. *Veſted* remainders (or remainders *executed*, whereby a preſent intereſt paſſes to the party, though to be enjoyed *in futuro*) are where the eſtate is invariably fixed, to remain to a determinate perſon, after the particular eſtate is ſpent. As if A be tenant for twenty

(p) Plowd. 25. 1 Rep. 66. (q) 1 Rep. 138. (r) 3 Rep. 21.

years,

years, remainder to B in fee; here B's is a veſted remainder, which nothing can defeat, or ſet aſide.

CONTINGENT or *executory* remainders (whereby no preſent intereſt paſſes) are where the eſtate in remainder is limited to take effect, either to a dubious and uncertain *perſon*, or upon a dubious and uncertain *event*; ſo that the particular eſtate may chance to be determined, and the remainder never take effect (s).

FIRST, they may be limited to a dubious and uncertain *perſon*. As if A be tenant for life, with remainder to B's eldeſt ſon (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a ſon or no: but the inſtant that a ſon is born, the remainder is no longer contingent, but veſted. Though, if A had died before the contingency happened, that is, before B's ſon was born, the remainder would have been abſolutely gone; for the particular eſtate was determined before the remainder could veſt. Nay, by the ſtrict rule of law, if A were tenant for life, remainder to his own eldeſt ſon in tail, and A died without iſſue born, but leaving his wife *enſeint* or big with child, and after his death a poſthumous ſon was born, this ſon could not take the land, by virtue of this remainder; for the particular eſtate determined before there was any perſon *in eſſe*, in whom the remainder could veſt (t). But, to remedy this hardſhip, it is enacted by ſtatute 10 & 11 W. III. c. 16. that poſthumous children ſhall be capable of taking in remainder, in the ſame manner as if they had been born in their father's life-time: that is, there mainder is allowed to veſt in them, while yet in their mother's womb (u).

THIS ſpecies of contingent remainders, to a perſon not in being, muſt however be limited to ſome one, that may by common poſſibility, or *potentia propinqua*, be *in eſſe* at or before the particular eſtate determines (w). As if an

(s) 3 Rep. 20.
(t) Salk. 228. 4 Mod. 282.
(u) See Vol. I. pag. 126.
(w) 2 Rep. 51.

eſtate

eſtate be made to A for life, remainder to the heirs of B: now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo eſt haeres viventis:* but if B dies firſt, the remainder then immediately veſts in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the poſſibility of B's dying before A is *potentia propinqua*, and therefore allowed in law (x). But a remainder to the right heirs of B (if there be no ſuch perſon as B *in eſſe)* is void (y). For here there muſt two contingencies happen; firſt, that ſuch a perſon as B ſhall be born; and, ſecondly, that he ſhall alſo die during the continuance of the particular eſtate; which make it *potentia remotiſſima*, a moſt improbable poſſibility. A remainder to a man's eldeſt ſon, who hath none, (we have ſeen) is good; for by common poſſibility he may have one; but if it be limited in particular to his ſon John, or Richard, it is bad, if he have no ſon of that name; for it is too remote a poſſibility that he ſhould not only have a ſon, but a ſon of a particular name (z). A limitation of a remainder to a baſtard before it is born, is not good (a); for though the law allows the poſſibility of having baſtards, it preſumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *perſon* who is to take it.

A REMAINDER may alſo be contingent, where the perſon to whom it is limited is fixed and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in caſe B ſurvives him, then with remainder to B in fee: here B is a certain perſon, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his ſurviving A. During the joint lives of A and B it is contingent; and if B dies firſt, it never can veſt in his heirs, but is for ever gone; but if A dies firſt, the remainder to B becomes veſted.

(x) Co. Litt. 378.
(y) Hob. 33.
(z) 5 Rep 51.
(a) Cro. Eliz. 509.

CONTIN-

CONTINGENT remainders of either kind, if they amount to a freehold, cannot be limited on an eſtate for years, or any other particular eſtate, leſs than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void (b): but if granted to A for life, with a like remainder, it is good. For, unleſs the freehold paſſes out of the grantor at the time when the remainder is created, ſuch freehold remainder is void: it cannot paſs out of him, without veſting ſomewhere; and in the caſe of a contingent remainder it muſt veſt in the particular tenant, elſe it can veſt no where: unleſs therefore the eſtate of ſuch particular tenant be of a freehold nature, the freehold cannot veſt in him, and conſequently the remainder is void.

CONTINGENT remainders may be *defeated*, by deſtroying or determining the particular eſtate upon which they depend, before the contingency happens whereby they become veſted (c). Therefore when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, ſurrender, or other methods, deſtroy and determine his own life-eſtate, before any of thoſe remainders veſt; the conſequence of which is, that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldeſt ſon unborn in tail, and the tenant for life, before any ſon is born, ſurrenders his life-eſtate, he by that means defeats the remainder in tail to his ſon: for his ſon not being *in eſſe*, when the particular eſtate determined, the remainder could not then veſt; and, as it could not veſt then, by the rules before laid down, it never can veſt at all. In theſe caſes therefore it is neceſſary to have truſtees appointed to preſerve the contingent remainders; in whom there is veſted an eſtate in remainder for the life of a tenant for life, to commence when his determines. If therefore his eſtate for life determines otherwiſe than by his death, their eſtate, for the reſidue of his na-

(b) 1 Rep. 130. (c) 1 Rep. 66. 135.

tural

tural life, will then take effect, and become a particular eſtate in poſſeſſion, ſufficient to ſupport the remainders depending in contingency. This method is ſaid to have been invented by ſir Orlando Bridgman, ſir Geoffrey Palmer, and other eminent council, who betook themſelves to conveyancing during the time of the civil wars; in order thereby to ſecure in family ſettlements a proviſion for the future children of an intended marriage, who before were uſually left at the mercy of the particular tenant for life (d); and when, after the reſtoration, thoſe gentlemen came to fill the firſt offices of the law, they ſupported this invention with reaſonable and proper bounds, and introduced it into general uſe.

THUS the ſtudent will obſerve how much nicety is required in creating and ſecuring a remainder; and I truſt he will in ſome meaſure ſee the general reaſons upon which this nicety is founded. It were endleſs to attempt to enter upon the particular ſubtilties and refinements, into which this doctrine, by the variety of caſes which have occurred in the courſe of many centuries, has been ſpun out and ſubdivided: neither are they conſonant to the deſign of theſe elementary diſquiſitions. I muſt not however omit, that in deviſes by laſt will and teſtament, (which, being often drawn up when the party is *inops concilii*, are always more favoured in conſtruction than formal deeds, which are preſumed to be made with great caution, fore-thought and advice) in theſe deviſes, I ſay, remainders may be created in ſome meaſure contrary to the rules before laid down: though our lawyers will not allow ſuch diſpoſitions to be ſtrictly remainders; but call them by another name, that of *executory deviſes*, or deviſes hereafter to be executed,

AN executory deviſe of lands is ſuch a diſpoſition of them by will, that thereby no eſtate veſts at the death of the deviſor, but only on ſome future contingency. It differs from a remainder in three very material points: 1. That it needs not any particular eſtate to ſupport it. 2. That by

(d) See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

it

it a fee-ſimple or other leſs eſtate, may be limited after a fee-ſimple. 3. That by this means a remainder may be limited of a chattel intereſt, after a particular eſtate for life created in the ſame.

1. THE firſt caſe happens when a man deviſes a future eſtate, to ariſe upon a contingency; and, till that contingency happens, does not diſpoſe of the fee-ſimple, but leaves it to deſcend to his heir at law. As if one deviſes land to a feme-ſole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular eſtate to ſupport it; a freehold commencing *in futuro*. This limitation, though it would be void in a deed, yet is good in a will, by way of executory deviſe (e). For, ſince by a deviſe a freehold may paſs without corporal tradition or livery of ſeiſin, (as it muſt do if it paſſes at all) therefore it may commence *in futuro*; becauſe the principal reaſon why it cannot commence *in futuro* in other caſes, is the neceſſity of actual ſeiſin, which always operates *in praeſenti*. And, ſince it may thus commence *in futuro*, there is no need of a particular eſtate to ſupport it; the only uſe of which is to make the remainder by its unity with the particular eſtate, a preſent intereſt. And hence alſo it follows, that ſuch an executory deviſe, not being a preſent intereſt, cannot be barred by a recovery, ſuffered before it commences (f).

2. BY executory deviſe, a fee, or other leſs eſtate, may be limited after a fee. And this happens where a deviſor deviſes his whole eſtate in fee, but limits a remainder thereon to commence on a future contingency. As if a man deviſes land to A and his heirs; but, if he dies before the age of twenty one, then to B and his heirs: this remainder, though void in a deed, is good by way of executory deviſe (g). But, in both theſe ſpecies of executory deviſes, the contingencies ought to be ſuch as may happen within a reaſonable time; as within one or more life or lives in being,

(e) 1 Sid. 153. (f) Cro. Jac. 593. (g) 2 Mod. 289.

ing, or within a moderate term of years; for courts of juſtice will not indulge even wills, ſo as to create a perpetuity, which the law abhors (h): becauſe by perpetuities, (or the ſettlement of an intereſt, which ſhall go in the ſucceſſion preſcribed, without any power of alienation) (i) eſtates are made incapable of anſwering thoſe ends, of ſocial commerce, and providing for the ſudden contingencies of private life, for which property was at firſt eſtabliſhed. The utmoſt length that has been hitherto allowed, for the contingency of an executory deviſe of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are deviſed to ſuch unborn ſon of a feme-covert, as ſhall firſt attain the age of twenty one, and his heirs; the utmoſt length of time that can happen before the eſtate can veſt, is the life of the mother and the ſubſequent infancy of her ſon: and this hath been decreed to be a good executory deviſe (k).

3. By executory deviſe a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for by law the firſt grant of it, to a man for life, was a total diſpoſition of the whole term; a life eſtate being eſteemed of a higher and larger nature than any term for years (l). And, at firſt, the courts were tender, even in the caſe of a will, of reſtraining the deviſee for life from aliening the term; but only held, that in caſe he died without exerting that act of ownerſhip, the remainder over ſhould then take place (m): for the reſtraint of the power of alienation, eſpecially in very long terms, was introducing a ſpecies of perpetuity. But, ſoon afterwards, it was held (n), that the deviſee for life hath no power of aliening the term, ſo as to bar the remainder-man: yet in order to prevent the danger of perpetuities, it was ſettled (o), that, though ſuch remainders may be limited to as many perſons ſucceſſively as the deviſor thinks proper, yet they muſt all be *in eſſe* during

(h) 12 Mod. 287. 1 Vern. 164.
(i) Salk. 229.
(k) Forr. 232.
(l) 8 Rep. 95.
(m) Bro. *tit. chatteles.* 23. Dyer. 74.
(n) Dyer. 358. 8 Rep. 96.
(o) 1 Sid. 451.

the

the life of the firſt deviſee; for then all the candles are lighted and are conſuming together, and the ultimate remainder is in reality only to that remainder-man who happens to ſurvive the reſt: or, that ſuch remainder may be limited to take effect upon ſuch contingency only, as muſt happen (if at all) during the life of the firſt deviſee (p).

THUS much for ſuch eſtates in expectancy, as are created by the expreſs words of the parties themſelves; the moſt intricate title in the law. There is yet another ſpecies, which is created by the act and operation of the law itſelf, and this is called a reverſion.

III. AN eſtate in *reverſion* is the reſidue of an eſtate left in the grantor, to commence in poſſeſſion after the determination of ſome particular eſtate granted out by him (q). Sir Edward Coke (r) deſcribes a reverſion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reverſion of the fee is, without any ſpecial reſervation, veſted in the donor by act of law: and ſo alſo the reverſion, after an eſtate for life, years, or at will, continues in the leſſor. For the fee-ſimple of all lands muſt abide ſomewhere; and if he, who was before poſſeſſed of the whole, carves out of it any ſmaller eſtate, and grants it away, whatever is not ſo granted remains in him. A reverſion is therefore never created by deed or writing, but ariſes from conſtruction of law; a remainder can never be limited, unleſs by either deed or deviſe. But both are equally transferable, when actually veſted, being both eſtates *in praeſenti*, though taking effect *in futuro*.

THE doctrine of reverſions is plainly derived from the feodal conſtitution. For, when a feud was granted to a man for life, or to him and his iſſue male, rendering either rent, or other ſervices; then, on his death or the failure of iſſue male, the feud was determined and reſulted back to the

(p) Skinn. 341. 3 P. Wms. 258. (q) Co. Litt. 22. (r) 1 Inſt. 142.

lord

lord or proprietor, to be again diſpoſed of at his pleaſure. And hence the uſual *incidents* to reverſions are ſaid to be *fealty* and *rent*. When no rent is reſerved on the particular eſtate, fealty however reſults of courſe, as an incident quite inſeparable, and may be demanded as a badge of tenure, or acknowledgment of ſuperiority; being frequently the only evidence that the lands are holden at all. Where rent is reſerved, it is alſo incident, though not inſeparably ſo, to the reverſion (s). The rent may be granted away, reſerving the reverſion; and the reverſion may be granted away, reſerving the rent; by *ſpecial* words: but by a *general* grant of the reverſion, the rent will paſs with it, as incident thereunto; though by the grant of the rent generally, the reverſion will not paſs. The incident paſſes by the grant of the principal, but not *e converſo*: for the maxim of the law is, "*acceſſorium non ducit, ſed ſequitur, ſuum "principale* (t)."

THESE *incidental* rights of the reverſioner, and the reſpective modes of deſcent, in which remainders very frequently differ from reverſions, have occaſioned the law to be careful in diſtinguiſhing the one from the other, however inaccurately the parties themſelves may deſcribe them. For if one, ſeiſed of a paternal eſtate in fee, makes a leaſe for life, with remainder to himſelf and his heirs, this is properly a mere reverſion (u), to which rent and fealty ſhall be incident; and which ſhall only deſcend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third perſon would have done (w): for it is the old eſtate, which was originally in him, and never yet was out of him. And ſo likewiſe, if a man grants a leaſe for life to A, reſerving rent, with reverſion to B and his heirs, B hath a remainder deſcendible to his heirs general, and not a reverſion, to which the rent is incident; but the grantor ſhall be intitled to the rent, during the continuance of A's eſtate (x).

(s) Co. Litt. 143.
(t) *Ibid*, 151, 152.
(u) Cro. Eliz. 321.
(w) 3 Lev. 407.
(x) 1 And. 23.

IN

IN order to aſſiſt ſuch perſons as have any eſtate in remainder, reverſion, or expectancy, after the death of others, againſt fraudulent concealments of their deaths, it is enacted by the ſtatute 6 Ann. c. 18. that all perſons on whoſe lives any lands or tenements are holden, ſhall (upon application to the court of chancery and order made thereupon) once in every year, if required, be produced to the court, or its commiſſioners; or, upon neglect or refuſal, they ſhall be taken to be actually dead, and the perſon entitled to ſuch expectant eſtate may enter upon and hold the lands and tenements, till the party ſhall appear to be living.

BEFORE we conclude the doctrine of remainders and reverſions, it may be proper to obſerve, that whenever a greater eſtate and a leſs coincide and meet in one and the ſame perſon, without any intermediate eſtate (y), the leſs is immediately annihilated; or, in the law phraſe, is ſaid to be *merged*, that is, ſunk or drowned, in the greater. Thus, if there be tenant for years, and the reverſion in fee-ſimple deſcends to or is purchaſed by him, the term of years is merged in the inheritance, and ſhall never exiſt any more. But they muſt come to one and the ſame perſon in one and the ſame right; elſe, if the freehold be in his own right, and he has a term in right of another *(en auter droit)* there is no merger. Therefore, if tenant for years dies, and makes him who hath the reverſion in fee his executor, whereby the term of years veſts alſo in him, the term ſhall not merge; for he hath the fee in his own right, and the term of years in the right of the teſtator, and ſubject to his debts and legacies. So alſo, if he who hath the reverſion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the leaſe in the right of his wife (z). An eſtate-tail is an exception to this rule: for a man may have in his own right both an eſtate-tail and a reverſion in fee; and the eſtate-tail, though a leſs eſtate, ſhall not merge in the fee (a). For eſtates-tail

(y) 3 Lev. 437.
(z) Plow. 418. Cro. Jac. 275. Co. Litt. 338.
(a) 2 Rep. 61. 8 Rep. 74.

are protected and preſerved from merger by the operation and conſtruction, though not by the expreſs words of the ſtatute *de donis*: which operation and conſtruction have probably ariſen upon this conſideration; that, in the common caſes of *merger* of eſtates for life or years by uniting with the inheritance, the particular tenant hath the ſole intereſt in them, and hath full power at any time to defeat, deſtroy, or ſurrender them to him that hath the reverſion; therefore, when ſuch an eſtate unites with the reverſion in fee, the law conſiders it in the light of a virtual ſurrender of the inferior eſtate (b). But, in an eſtate-tail, the caſe is otherwiſe: the tenant for a long time had no power at all over it, ſo as to bar or to deſtroy it; and now can only do it by certain ſpecial modes, by a fine, a recovery, and the like (c): it would therefore have been ſtrangely improvident to have permitted the tenant in tail, by purchaſing the reverſion in fee to merge his particular eſtate, and defeat the inheritance of his iſſue; and hence it has become a maxim, that a tenancy in tail, which cannot be ſurrendered, cannot alſo be merged in the fee.

(b) Cro. Eliz. 302. (c) See pag. 116.

CHAPTER

CHAPTER THE TWELFTH.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

WE come now to treat of eſtates, with reſpect to the number and connexions of their owners, the tenants who occupy and hold them. And, conſidered in this view, eſtates of any quantity or length of duration, and whether they be in actual poſſeſſion or expectancy, may be held in four different ways; in ſeveralty, in joint-tenancy, in coparcenary, and in common.

I. HE that holds lands or tenements in *ſeveralty*, or is ſole tenant thereof, is he that holds them in his own right only, without any other perſon being joined or connected with him in point of intereſt, during his eſtate therein. This is the moſt common and uſual way of holding an eſtate; and therefore we may make the ſame obſervations here, that we did upon eſtates in poſſeſſion, as contradiſtinguiſhed from thoſe in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, ſince all eſtates are ſuppoſed to be of this ſort, unleſs where they are expreſsly declared to be otherwiſe; and that, in laying down general rules and doctrines, we uſually apply them to ſuch eſtates as are held in ſeveralty. I ſhall therefore proceed to conſider the other three ſpecies of eſtates, in which there are always a plurality of tenants.

II. An eſtate in *joint-tenancy* is where lands or tenements are granted to two or more perſons, to hold in fee-ſimple, fee-tail, for life, for years, or at will. In conſequence of ſuch grants the eſtate is called an eſtate in joint-tenancy (a), and ſometimes an eſtate in *jointure*, which word as well as the other ſignifies a union or conjunction of intereſt; though in common ſpeech the term, *jointure*, is now uſually confined to that joint-eſtate, which by virtue of the ſtatute 27 Hen. VIII. c. 10. is frequently veſted in the huſband and wife before marriage, as a full ſatisfaction and bar of the woman's dower (b).

In unfolding this title, and the two remaining ones in the preſent chapter, we will firſt enquire, how theſe eſtates may be *created*; next, their *properties* and reſpective *incidents*; and laſtly, how they may be *ſevered* or *deſtroyed*.

1. The *creation* of an eſtate in joint-tenancy depends on the wording of the deed or deviſe, by which the tenants claim title; for this eſtate can only ariſe by purchaſe or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an eſtate be given to a plurality of perſons, without adding any reſtrictive, excluſive, or explanatory words, as if an eſtate be granted to A and B and their heirs, this makes them immediately joint-tenants in fee of the lands. For the law interprets the grant ſo as to make all parts of it take effect, which can only be done by creating an equal eſtate in them both. As therefore the grantor has thus united their names, the law gives them a thorough union in all other reſpects. For,

2. The *properties* of a joint eſtate are derived from its unity, which is fourfold; the unity of *intereſt*, the unity of *title*, the unity of *time*, and the unity of *poſſeſſion*: or, in other words, joint-tenants have one and the ſame intereſt, accruing by one and the ſame conveyance, commencing at one and the ſame time, and held by one and the ſame undivided poſſeſſion.

(a) Litt. §. 277. (b) See pag. 137.

First,

FIRST, they muſt have one and the ſame *intereſt*. One joint-tenant cannot be entitled to one period of duration or quantity of intereſt in lands, and the other to a different: one cannot be tenant for life, and the other for years: one cannot be tenant in fee, and the other in tail (c). But, if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance (d). If land be granted to A and B for their lives and to the heirs of A; here A and B are joint-tenants of the freehold during their reſpective lives, and A has the remainder of the fee in ſeveralty: or, if land be given to A and B, and the heirs of the body of A; here both have a joint eſtate for life, and A hath a ſeveral remainder in tail (e). Secondly, joint-tenants muſt alſo have an unity of *title:* their eſtate muſt be created by one and the ſame act, whether legal or illegal; as by one and the ſame grant, or by one and the ſame diſſeiſin (f). Joint tenancy cannot ariſe by deſcent or act of law; but merely by purchaſe, or acquiſition by the act of the party: and, unleſs that act be one and the ſame, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would abſolutely deſtroy the jointure. Thirdly, there muſt alſo be an unity of *time:* their eſtates muſt be veſted at one and the ſame period, as well as by one and the ſame title. As in caſe of a preſent eſtate made to A and B; or a remainder in fee to A and B after a particular eſtate; in either caſe A and B are joint-tenants of this preſent eſtate, or this veſted remainder. But, if after a leaſe for life, the remainder be limited to the heirs of A and B: and during the continuance of the particular eſtate A dies, which veſts the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes veſted in the heir of B: now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common; for one moiety veſted at one time, and the other moiety veſted at another (g). Yet, where a feoffment

(c) Co. Litt. 188.
(d) Litt. §. 277.
(e) *Ibid.* §. 285.
(f) *Ibid.* §. 278.
(g) Co. Litt. 188.

was made to the uſe of a man, and ſuch wife as he ſhould afterwards marry, for term of their lives, and he afterwards married; in this caſe it ſeems to have been held that the huſband and wife had a joint eſtate, though veſted at different times (h): becauſe the *uſe* of the wife's eſtate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation. Laſtly, in joint-tenancy, there muſt be an unity of *poſſeſſion*. Joint-tenants are ſaid to be ſeiſed *per my et per tout*, by the *half* or *moiety*, and by *all*; that is, they each of them have the entire poſſeſſion, as well of every *parcel* as of the *whole* (i). They have not, one of them a ſeiſin of one half or moiety, and the other of the other moiety; neither can one be excluſively ſeiſed of one acre, and his companion of another; but each has an undivided moiety of the whole, and not the whole of an undivided moiety (k).

Upon theſe principles, of a thorough and intimate union of intereſt and poſſeſſion, depend many other conſequences and incidents to the joint-tenant's eſtate. If two joint-tenants lett a verbal leaſe of their land, reſerving rent to be paid to one of them, it ſhall alſo enure to both, in reſpect of the joint reverſion (l). If their leſſee ſurrenders his leaſe to one of them, it ſhall alſo enure to both, becauſe of the privity, or relation of their eſtate (m). On the ſame reaſon, livery of ſeiſin, made to one joint-tenant, ſhall enure to both of them (n): and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both (o). In all actions alſo relating to their joint eſtate, one joint-tenant cannot ſue or be ſued without joining the other (p). But if two or more joint-tenants be ſeiſed of an advowſon, and they preſent different clerks, the biſhop may refuſe to admit either; becauſe neither joint-tenant hath a ſeveral right of patronage, but each is ſeiſed of the whole: and, if they

(h) Dyer. 340. 1 Rep. 101.
(i) Litt. §. 288. 5 Rep. 10.
(k) *Quilibet totum tenet et nihil tenet: ſcilicet, totum in communi, et nihil ſeperatim per ſe.* Bract. *l.* 5. *tr.* 5. *c.* 26.
(l) Co. Litt. 214.
(m) *Ibid.* 192.
(n) *Ibid.* 49.
(o) *Ibid.* 319. 364.
(p) *Ibid.* 195.

do

do not both agree within ſix months, the right of preſentation ſhall lapſe. But the ordinary may, if he pleaſes, admit a clerk preſented by either, for the good of the church, that divine ſervice may be regularly performed; which is no more than he otherwiſe would be entitled to do, in caſe their diſagreement continued, ſo as to incur a lapſe; and, if the clerk of one joint-tenant be ſo admitted, this ſhall keep up the title in both of them; in reſpect of the privity and union of their eſtate (q). Upon the ſame ground it is held, that one joint-tenant cannot have an action againſt another for treſpaſs, in reſpect of his land (r); for each had an equal right to enter on any part of it. But one joint-tenant is not capable by himſelf to do any act, which may tend to defeat or injure the eſtate of the other; as to lett leaſes, or to grant copyholds (s): and, if any waſte be done, which tends to the deſtruction of the inheritance, one joint-tenant may have an action of waſte againſt the other, by conſtruction of the ſtatute Weſtm. 2. c. 22. (t). So too, though at common law no action of account lay for one joint-tenant againſt another, unleſs he had conſtituted him his bailiff or receiver (u), yet now by the ſtatute 4 Ann. c. 16. joint-tenants may have actions of account againſt each other, for receiving more than their due ſhare of the profits of the tenements held in joint-tenancy.

FROM the ſame principle alſo ariſes the remaining grand incident of joint-eſtates; *viz.* the doctrine of *ſurvivorſhip*: by which, when two or more perſons are ſeiſed of a joint eſtate of inheritance, for their own lives, or *pur auter vie*, or are jointly poſſeſſed of any chattel intereſt, the entire tenancy upon the deceaſe of any of them remains to the ſurvivors, and at length to the laſt ſurvivor; and he ſhall be entitled to the whole eſtate, whatever it be, whether an inheritance or a common freehold only, or even a leſs eſtate (w). This is the natural and regular conſequence of the union and entirety of their intereſt. The intereſt of two

(q) Co. Litt. 185.
(r) 3 Leon. 262.
(s) 1 Leon. 234.
(t) 2 Inſt. 403.
(u) Co. Litt. 200.
(w) Litt. §. 280, 281.

joint-tenants is not only equal or ſimilar, but alſo is one and the ſame. One has not originally a diſtinct moiety from the other; but, if by any ſubſequent act (as by alienation or forfeiture of either) the intereſt becomes ſeparate and diſtinct, the joint-tenancy inſtantly ceaſes. But, while it continues, each of two joint-tenants has a concurrent intereſt in the whole; and therefore, on the death of his companion, the ſole intereſt in the whole remains to the ſurvivor. For the intereſt, which the ſurvivor originally had, is clearly not deveſted by the death of his companion; and no other perſon can now claim to have a *joint* eſtate with him, for no one can now have an intereſt in the whole, accruing by the ſame title, and taking effect at the ſame time with his own; neither can any one claim a *ſeparate* intereſt in any part of the tenements; for that would be to deprive the ſurvivor of the right which he has in all, and every part. As therefore the ſurvivor's original intereſt in the whole ſtill remains; and as no one can now be admitted, either jointly or ſeverally, to any ſhare with him therein; it follows, that his own intereſt muſt now be entire and ſeveral, and that he ſhall alone be entitled to the whole eſtate (whatever it be) that was created by the original grant.

This right of ſurvivorſhip is called by our antient authors (x) the *jus accreſcendi*, becauſe the right, upon the death of one joint-tenant, accumulates and increaſes to the ſurvivors; or, as they themſelves expreſs it, "*pars illa communis accreſcit ſuperſtitibus, de perſona in perſonam, uſque ad ultimum ſuperſtitem.*" And this *jus accreſcendi* ought to be mutual; which I apprehend to be the reaſon why neither the king (y), or any corporation (z), can be a joint-tenant with a private perſon. For here is no mutuality: the private perſon has not even the remoteſt chance of being ſeiſed of the entirety, by benefit of ſurvivorſhip, for the king and the corporation can never die.

(x) Bracton, l. 4. *tr.* 3. *c.* 9. §. 3. Fleta. *l.* 3. *c.* 4.
(y) Co. Litt. 190. Finch. L. 83.
(z) 2 Lev. 12.

3. We

3. We are, laſtly, to enquire how an eſtate in joint-tenancy, may be *ſevered* and *deſtroyed*. And this may be done by deſtroying any of its conſtituent unities. 1 That of *time*, which reſpects only the original commencement of the joint-eſtate, cannot indeed (being now paſt) be affected by any ſubſequent tranſactions. But, 2. the joint-tenants' eſtate may be deſtroyed, without any alienation, by merely diſuniting their *poſſeſſion*. For joint-tenants being ſeiſed *per my et per tout*, every thing that tends to narrow that intereſt, ſo that they ſhall not be ſeiſed throughout the whole, and throughout every part, is a ſeverance or deſtruction of the jointure. And therefore, if two joint-tenants agree to part their lands, and hold them in ſeveralty, they are no longer joint-tenants; for they have now no joint intereſt in the whole, but only a ſeveral intereſt reſpectively in the ſeveral parts. And, for that reaſon alſo, the right of ſurvivorſhip is by ſuch ſeparation deſtroyed (a). By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the others ſo to do (b): for, this being an eſtate originally created by the act and agreement of the parties, the law would not permit any one or more of them to deſtroy the united poſſeſſion without a ſimilar univerſal conſent (c). But now by the ſtatutes 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. joint-tenants, either of inheritances or other leſs eſtates, are compellable by writ of partition to divide their lands. 3. The jointure may be deſtroyed, by deſtroying the unity of *title*. As if one joint-tenant alienes and conveys his eſtate to a third perſon: here the joint-tenancy is ſevered, and turned into tenancy in common (d); for the grantee and the remaining joint-tenant hold by different titles, (one derived from the original, the other from the ſubſequent, grantor) though, till partition made, the unity of poſſeſſion continues.

(a) Co. Litt. 188. 193.

(b) Litt. §. 290.

(c) Thus, by the civil law, *nemo invitus compellitur ad communionem.* (*Ff.* 12. 6. 26. §. 4.) And again: *ſi non omnes qui rem communem habent, ſed certi ex his, dividere deſiderant; hoc judicium inter eos accipi poteſt.* (*Ff.* 10. 3. 8.)

(d) Litt. §. 292.

But

But a deviſe of one's ſhare by will is no ſeverance of the jointure: for no teſtament takes effect till after the death of the teſtator, and by ſuch death the right of the ſurvivor (which accrues at the original creation of the eſtate, and has therefore a priority to the (e) other) is already veſted (f). 4. It may alſo be deſtroyed, by deſtroying the unity of *intereſt*. And therefore, if there be two joint-tenants for life, and the inheritance is purchaſed by or deſcends upon either, it is a ſeverance of the jointure (g): though, if an eſtate is originally limited to two for life, and after to the heirs of one of them, the freehold ſhall remain in jointure, without merging in the inheritance; becauſe, being created by one and the ſame conveyance, they are not ſeparate eſtates, (which is requiſite in order to a merger) but branches of one entire eſtate (h). In like manner, if a joint-tenant in fee makes a leaſe for life of his ſhare, this defeats the jointure (i); for it deſtroys the unity both of title and of intereſt. And, whenever or by whatever means the jointure ceaſes or is ſevered, the right of ſurvivorſhip or *jus accreſcendi* the ſame inſtant ceaſes with it (k). Yet, if one of three joint-tenants alienes his ſhare, the two remaining tenants ſtill hold their parts by joint-tenancy and ſurvivorſhip (l): and, if one of the three joint-tenants releaſes his ſhare to one of his companions, though the joint-tenancy is deſtroyed with regard to that part, yet the two remaining parts are ſtill held in jointure (m); for they ſtill preſerve their original conſtituent unities. But when, by any act or event, different intereſts are created in the ſeveral parts of the ſtate, or they are held by different titles, or if merely the poſſeſſion is ſeparated; ſo that the tenants have no longer theſe four indiſpenſable properties, a fameneſs of intereſt, an undivided poſſeſſion, a title veſting at one and the ſame time, and by one and the ſame act or grant; the jointure is inſtantly diſſolved.

(e) *Jus accreſcendi praefertur ultimae voluntati.* Co. Litt. 185.
(f) Litt. §. 287.
(g) Cro. Eliz. 470.
(h) 2 Rep. 60. Co. Litt. 182.
(i) Litt. §. 302, 303.
(k) *Nihil de re accreſcit ei, qui nihil in re quando jus actreſceret habet.* Co. Litt. 188.
(l) Litt. §. 294.
(m) *Ibid.* §. 304.

IN

IN general it is advantageous for the joint-tenants to diſſolve the jointure; ſince thereby the right of ſurvivorſhip is taken away, and each may tranſmit his own part to his own heirs. Sometimes however it is diſadvantageous to diſſolve the joint-eſtate: as if there be joint-tenants for life, and they make partition, this diſſolves the jointure; and, though before they each of them had an eſtate in the whole for their own lives and the life of their companion, now they have an eſtate in a moiety only for their own lives merely; and, on the death of either, the reverſioner ſhall enter on his moiety (n). And therefore, if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture (o): for, in the firſt place, by the ſeverance of the jointure he has given himſelf in his own moiety only an eſtate for his own life; and then he grants the ſame land for the life of another, which grant, by a tenant for his own life merely, is a forfeiture of his eſtate (p); for it is creating an eſtate which may by poſſibility laſt longer than that he is legally entitled to.

III. AN eſtate held in *coparcenary* is where lands of inheritance deſcend from the anceſtor to two or more perſons. It *ariſes* either by common law, or particular cuſtom. By common law: as where a perſon ſeiſed in fee-ſimple or in fee-tail dies, and his next heirs are two or more females, his daughters, ſiſters, aunts, couſins, or their repreſentatives; in this caſe they ſhall all inherit, as will be more fully ſhewn, when we treat of deſcents hereafter: and theſe co-heirs are then called *coparceners*; or, for brevity, *parceners* only (q). Parceners by particular cuſtom are where lands deſcend, as in gavelkind to all the males in equal degree, as ſons, brothers, uncles, *&c.* (r). And, in either of theſe caſes, all the parceners put together make but one heir; and have but one eſtate among them (s).

(n) 1 Jones. 55.
(o) 4 Leon. 237.
(p) Co. Litt. 252.
(q) Litt. §. 241, 242.
(r) *Ibid.* §. 265.
(s) Co. Litt. 163.

THE

THE *properties* of parceners are in ſome reſpects like thoſe of joint-tenants; they having the ſame unities of *intereſt*, *title*, and *poſſeſſion*. They may ſue and be ſued jointly for matters relating to their own land (t): and the entry of one of them ſhall in ſome caſes enure as the entry of them all (u). They cannot have an action of treſpaſs againſt each other: but herein they differ from joint-tenants, that they are alſo excluded from maintaining an action of waſte (w); for coparceners could at all times put a ſtop to any waſte by a writ of partition, but till the ſtatute of Henry the eighth joint-tenants had no ſuch power. Parceners alſo differ materially from joint-tenants, in four other points: 1. They always claim by deſcent, whereas joint-tenants always claim by purchaſe. Therefore if two ſiſters purchaſe lands, to hold to them and their heirs, they are not parceners, but joint-tenants (x): and hence it likewiſe follows, that no lands can be held in coparcenary, but eſtates of inheritance, which are of a deſcendible nature; whereas not only eſtates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* neceſſary to an eſtate in coparcenary. For, if a man hath two daughters, to whom his eſtate deſcends in coparcenary, and one dies before the other; the ſurviving daughter and the heir of the other, or, when both are dead, their two heirs, are ſtill parceners (y); the eſtates veſting in each of them at different times, though it be the ſame quantity of intereſt, and held by the ſame title. 3. Parceners, though they have a *unity*, have not an *entirety*, of intereſt. They are properly intitled each to the whole of a diſtinct moiety (z); and of courſe there is no *jus accreſcendi*, or ſurvivorſhip between them: for each part deſcends ſeverally to their reſpective heirs, though the unity of poſſeſſion continues. And as long as the lands continue in a courſe of deſcent, and united in poſſeſſion, ſo long are the tenants thereof, whether male or female, called parceners. But if the poſſeſſion be once ſevered by partition,

(t) Co. Litt. 164.
(u) *Ibid.* 188.
(w) 2 Inſt. 403.
(x) Litt. §. 254.
(y) Co. Litt. 164. 174.
(z) *Ibid.* 163, 164.

they

they are no longer parceners, but tenants in ſeveralty; or if one parcener alienes her ſhare, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common* (a).

PARCENERS are ſo called, ſaith Littleton (b), becauſe they may be conſtrained to make *partition*. And he mentions many methods of making it (c); four of which are by conſent, and one by compulſion. The firſt is, where they agree to divide the lands into equal parts in ſeveralty, and that each ſhall have ſuch a determinate part. The ſecond is, when they agree to chuſe ſome friend to make partition for them, and then the ſiſters ſhall chuſe each of them her part according to ſeniority of age; or otherwiſe as ſhall be agreed. But this privilege of ſeniority is then perſonal; for if the eldeſt ſiſter be dead, her iſſue ſhall not chuſe firſt, but the next ſiſter. But, if an advowſon deſcend in coparcenary, and the ſiſters cannot agree in the preſentation, the eldeſt and her iſſue, nay her huſband, or her aſſigns, ſhall preſent alone, before the younger (d). And the reaſon given is that the former privilege, of priority in choice upon a diviſion, ariſes from an act of her own, the agreement to make partition; and therefore is merely perſonal; the latter of preſenting to the living, ariſes from the act of the law, and is annexed not only to her perſon, but to her eſtate alſo. A third method of partition is, where the eldeſt divides, and then ſhe ſhall chuſe laſt; for the rule of law is, *cujus eſt diviſio, alterius eſt electio*. The fourth method is, where the ſiſters agree to caſt lots for their ſhares. And theſe are the methods by conſent. That by compulſion is, where one or more ſue out a writ of partition againſt the others, whereupon the ſheriff ſhall go to the lands, and make partition thereof by the verdict of a jury there impanneled, and aſſign to each of the parceners her part in ſeveralty (e). But there are ſome things which are in their

(a) Litt. §. 309.
(b) §. 241.
(c) §. 243. to 264.
(d) Co. Litt. 166. Rep. 22.
(e) By ſtatute 8 & 9 W. III. c. 3. An eaſier method of carrying on the proceedings on a writ of partition, of lands held either in joint-tenancy, parcenary, or common, than was uſed at the common law, is chalked out and provided.

nature

nature impartible. The manſion-houſe, common of eſtovers, common of piſcary uncertain, or any other common without ſtint, ſhall not be divided; but the eldeſt ſiſter, if ſhe pleaſes, ſhall have them, and make the others a reaſonable ſatisfaction in other parts of the inheritance; or, if that cannot be, then they ſhall have the profits of the thing by turns, in the ſame manner as they take the advowſon (f).

THERE is yet another conſideration attending the eſtate in coparcenary; that if one of the daughters had an eſtate given with her in *frankmarriage* by her anceſtor (which we may remember was a ſpecies of eſtate-tail, freely given by a relation for advancement of his kinſwoman in (g) marriage) in this caſe, if lands deſcend from the *ſame* anceſtor to her and her ſiſters in fee-ſimple, ſhe or her heirs ſhall have no ſhare of them, unleſs they will agree to divide the lands ſo given in frankmarriage in equal proportion with the reſt of the lands deſcending (h). This general diviſion was known in the law of the Lombards (i), which direct the woman ſo preferred in marriage, and claiming her ſhare of the inheritance, *mittere in confuſum cum ſororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum.* With us it is denominated bringing theſe lands into *hotchpot* (k); which term I ſhall explain in the very words of Littleton (l): "it ſeemeth that this "word, hotchpot, is in Engliſh, a pudding; for in a pud"ding is not commonly put one thing alone, but one thing "with other things together." By this houſewifery metaphor our anceſtors meant to inform us (m), that the lands, both thoſe given in frankmarriage and thoſe deſcending in fee-ſimple, ſhould be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frankmarriage, and if ſhe did not chuſe to put her lands in hotchpot, ſhe was preſumed to be ſufficiently provided for, and the reſt of

(f) Co. Litt. 164, 165.
(g) See pag. 115.
(h) Bracton. *l.* 2. *c.* 34. Litt. §. 266, to 273.
(i) *l.* 2. *t.* 14. *c.* 15.
(k) Britton. *c.* 72.
(l) §. 267.
(m) Litt. §. 268.

the

the inheritance was divided among her other ſiſters. The law of hotchpot took place then only, when the other lands deſcending from the anceſtor were fee-ſimple; for, if they deſcended in tail, the donee in frankmarriage was intitled to her ſhare without bringing her lands ſo given into hotchpot (n). And the reaſon is, becauſe lands deſcending in fee-ſimple are diſtributed by the policy of law, for the maintenance of all the daughters; and, if one has a ſufficient proviſion out of the ſame inheritance, equal to the reſt, it is not reaſonable that ſhe ſhould have more: but lands, deſcending in tail, are not diſtributed by the operation of law, ſo properly as *per formam doni*; it matters not therefore how unequal this diſtribution may be. Alſo no lands, but ſuch as are given in frankmarriage, ſhall be brought into hotchpot; for no others are looked upon in law as given for the advancement of the woman, or by way of marriage-portion (o). And therefore, as gifts in frankmarriage are fallen into diſuſe, I ſhould hardly have mentioned the law of hotchpot, had not this method of diviſion been revived and copied by the ſtatute for diſtribution of perſonal eſtates, which we ſhall hereafter conſider at large.

THE eſtate in coparcenary may be *diſſolved*, either by partition, which diſunites the poſſeſſion; by alienation of one parcener, which diſunites the title, and may diſunite the intereſt; or by the whole at laſt deſcending to and veſting in one ſingle perſon, which brings it to an eſtate in ſeveralty.

IV. TENANTS in *common* are ſuch as hold by ſeveral and diſtinct titles, but by unity of poſſeſſion; becauſe none knoweth his own ſeveralty, and therefore they all occupy promiſcuouſly (p). This tenancy therefore happens, where there is an union of poſſeſſion merely, but perhaps an entire diſunion of intereſt, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee-ſimple, the other in tail, or for life;

(n) Litt. §. 274.
(o) *Ibid.* 275.
(p) *Ibid.* 292.

ſo

ſo that there is no neceſſary unity of intereſt: one may hold by deſcent, the other by purchaſe; or the one by purchaſe from A, the other by purchaſe from B; ſo that there is no unity of title: one's eſtate may have been veſted fifty years, the other's but yeſterday; ſo there is no unity of time. The only unity there is, is that of poſſeſſion; and for this Littleton gives the true reaſon, becauſe no man can certainly tell which part is his own: otherwiſe even this would be ſoon deſtroyed.

TENANCY in common may be created, either by the deſtruction of the two other eſtates, in joint-tenancy and coparcenary, or by ſpecial limitation in a deed. By the deſtruction of the two other eſtates, I mean ſuch deſtruction as does not ſever the unity of poſſeſſion, but only the unity of title or intereſt. As if one of the two joint-tenants in fee alienes his eſtate for the life of the alienee, the alienee and the other joint-tenant are tenants in common: for they now have ſeveral titles, the other joint-tenant by the original grant, the alienee by the new alienation (q); and they alſo have ſeveral intereſts, the former joint-tenant in fee-ſimple, the alienee for his own life only. So, if one joint-tenant give his part to A in tail, and the other give his to B in tail, the donees are tenants in common, as holding by different titles and conveyances (r). If one of two parceners alienes, the alienee and the remaining parcener are tenants in common (s); becauſe they hold by different titles; the parcener by deſcent, the alienee by purchaſe. So likewiſe, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees ſhall be joint-tenants of the life-eſtate, but they ſhall have ſeveral inheritances; becauſe they cannot poſſibly have one heir of their two bodies, as might have been the caſe had the limitation been to *a man and woman*, and the heirs of their bodies begotten (t): and in this, and the like caſes, their iſſues ſhall be tenants in common; becauſe they muſt claim by different titles, one as heir of A, and the other as heir of B; and thoſe too not titles by

(q) Litt. §. 293.
(r) *Ibid.* 295.
(s) *Ibid* 309.
(t) *Ibid.* 283.

purchaſe,

purchaſe, but deſcent. In ſhort, whenever an eſtate in joint-tenancy or coparcenary is diſſolved, ſo that there be no partition made, but the unity of poſſeſſion continues, it is turned into a tenancy in common.

A TENANCY in common may alſo be created by expreſs limitation in a deed: but here care muſt be taken not to inſert words which imply a joint eſtate; and then if lands be given to two or more, and it be not joint-tenancy, it muſt be a tenancy in common. But the law is apt in its conſtructions to favour joint-tenancy rather than tenancy in common (a); becauſe the diviſible ſervices iſſuing from land (as rent, *&c.*) are not divided, nor the entire ſervices (as fealty) multiplied, by joint tenancy, as they muſt neceſſarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an eſtate in common (b); and, if one grants to another *half* his land, the grantor and grantee are alſo tenants in common (c): becauſe, as has been before (d) obſerved, joint tenants do not take by diſtinct halves or moieties; and by ſuch grants the diviſion and ſeveralty of the eſtate are ſo plainly expreſſed, that it is impoſſible they ſhould take a joint intereſt in the whole of the tenements. But a *deviſe* to two perſons, to hold *jointly and ſeverally*, is a joint-tenancy; becauſe that is implied in the word "jointly," even though the word "ſeverally" ſeems to imply the direct reverſe (e): and an eſtate given to A and B, *equally to be divided* between them, though in *deeds* it hath been ſaid to be a joint-tenancy (f), (for it implies no more than the law hath annexed to that eſtate, *viz.* diviſibility) (g) yet in *wills* it is certainly a tenancy in common (h); becauſe the deviſor may be preſumed to have meant what is moſt beneficial to both the deviſees, though his meaning is imperfectly expreſſed. And this nicety in the wording of grants makes it the moſt uſual, as well as the ſafeſt way, when a

(a) Salk. 392.
(b) Litt. §. 298.
(c) *Ibid.* 299.
(d) See page 182.
(e) Poph. 52.
(f) 1 Equ. Caſ. abr. 291.
(g) 1 P. Wms. 17.
(h) 3 Rep. 39. 1 Ventr. 32.

tenancy in common is meant to be created, to add expreſs words of excluſion as well as deſcription, and limit the eſtate to A and B, to hold *as tenants in common, and not as joint tenants.*

As to the *incidents* attending a tenancy in common: tenants in common (like joint-tenants) are compellable by the ſtatutes of Henry VIII and William III, before-mentioned (i), to make partition of their lands; which they were not at common law. They properly take by diſtinct moieties, and have no entirety of intereſt; and therefore there is no ſurvivorſhip between tenants in common. Their other incidents are ſuch as merely ariſe from the unity of poſſeſſion; and are therefore the ſame as appertain to joint-tenants merely upon that account: ſuch as being liable to reciprocal actions of waſte, and of account, by the ſtatutes of Weſtm. 2. c. 22. and 4 Ann. c. 16. For by the common law no tenant in common was liable to account to his companion for embezzling the profits of the eſtate (k); though, if one actually turns the other out of poſſeſſion, an action of ejectment will lie againſt him (l), But, as for other incidents of joint-tenants, which ariſe from the privity of title, or the union and entirety of intereſt, (ſuch as joining or being joined in actions (m), unleſs in the caſe where ſome intire or indiviſible thing is to be recovered) (n) theſe are not applicable to tenants in common, whoſe intereſts are diſtinct, and whoſe titles are not joint but ſeveral.

ESTATES in common can only be *diſſolved* two ways: 1. By uniting all the titles and intereſts in one tenant, by purchaſe or otherwiſe; which brings the whole to one ſeveralty: 2. By making partition between the ſeveral tenants in common, which gives them all reſpective ſeveralties. For indeed tenancies in common differ in nothing from ſole eſtates, but merely in the blending and unity of poſſeſſion. And this finiſhes our enquiries with reſpect to the nature of *eſtates.*

(i) pag. 185, & 186.
(k) Co. Litt. 199.
(l) *Ibid.* 200.
(m) Litt. §. 311.
(n) Co. Litt. 197.

CHAPTER

CHAPTER THE THIRTEENTH.

OF THE TITLE TO THINGS REAL, IN GENERAL.

THE foregoing chapters having been principally employed in defining the *nature* of things real, in deſcribing the *tenures* by which they may be holden, and in diſtinguiſhing the ſeveral kinds of *eſtate* or intereſt that may be had therein, I come now to conſider, laſtly, the *title* to things real, with the manner of acquiring and loſing it. A title is thus defined by ſir Edward Coke (a), *titulus eſt juſta cauſa poſſidendi id quod noſtrum eſt*; or, it is the means whereby the owner of lands hath the juſt poſſeſſion of his property.

THERE are ſeveral ſtages or degrees requiſite to form a complete title to lands and tenements. We will conſider them in a progreſſive order.

I. The loweſt and moſt imperfect degree of title conſiſts in the mere *naked poſſeſſion*, or actual occupation of the eſtate; without any apparent right, or any ſhadow or pretence of right, to hold and continue ſuch poſſeſſion. This may happen, when one man invades the poſſeſſion of another, and by force or ſurprize turns him out of the occupation of his lands; which is termed a *diſſeiſin*, being a deprivation of that actual ſeiſin, or corporal freehold of the lands, which

(a) 2 Inſt. 345.

the tenant before enjoyed. Or it may happen, that after the death of the anceſtor, and before the entry of the heir, or after the death of a particular tenant, and before the entry of him in remainder or reverſion, a ſtranger may contrive to get poſſeſſion of the vacant land, and hold out him that had a right to enter. In all which caſes, and many others that might be here ſuggeſted, the wrongdoer has only a mere naked poſſeſſion, which the rightful owner may put an end to, by a variety of legal remedies, as will more fully appear in the third book of theſe commentaries. But in the mean time, till ſome act be done by the rightful owner to deveſt this poſſeſſion and aſſert his title, ſuch actual poſſeſſion is, *prima facie*, evidence of a legal title in the poſſeſſor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeaſible title. And, at all events, without ſuch actual poſſeſſion no title can be completely good.

II. THE next ſtep to a good and perfect title is the *right of poſſeſſion*, which may reſide in one man, while the actual poſſeſſion is either in himſelf or in another. For if a man be diſſeiſed, or otherwiſe kept out of poſſeſſion, by any of the means before-mentioned, though the *actual* poſſeſſion be loſt, yet he has ſtill remaining in him the *right* of poſſeſſion; and may exert it whenever he thinks proper, by entering upon the diſſeiſor, and turning him out of that occupancy which he has ſo illegally gained. But this right of poſſeſſion is of two ſorts; an *apparent* right of poſſeſſion, which may be defeated by proving a better; and an *actual* right of poſſeſſion, which will ſtand the teſt againſt all opponents. Thus if the diſſeiſor, or other wrongdoer, dies poſſeſſed of the land whereof he ſo became ſeiſed by his own unlawful act, and the ſame deſcends to his heir; now, by the common law, the heir hath obtained an *apparent* right, though the *actual* right of poſſeſſion reſides in the perſon diſſeiſed; and it ſhall not be lawful for the perſon diſſeiſed to deveſt this apparent right by mere entry or other act of his own, but only by an action at law (b). For, until the contrary be proved by legal de-

(b) Litt. §. 385.

monſtration,

monſtration, the law will rather preſume the right to reſide in the heir, whoſe anceſtor died ſeiſed, than in one who has no ſuch preſumptive evidence to urge in his own behalf. Which doctrine in ſome meaſure aroſe from the principles of the feodal law, which, after feuds became hereditary, much favoured the right of deſcent; in order that there might be a perſon always on the ſpot to perform the feodal duties and ſervices (c): and therefore, when a feudatory died in battle, or otherwiſe, it preſumed always that his children were entitled to the feud, till the right was otherwiſe determined by his fellow-ſoldiers and fellow-tenants, the peers of the feodal court. But if he, who has the actual right of poſſeſſion, puts in his claim and brings his action within a reaſonable time, and can prove by what unlawful means the anceſtor became ſeiſed, he will then by ſentence of law recover that poſſeſſion, to which he hath ſuch actual right. Yet, if he omits to bring this his poſſeſſory action within a competent time, his adverſary may imperceptibly gain an actual right of poſſeſſion, in conſequence of the other's negligence. And by this, and certain other means, the party kept out of poſſeſſion may have nothing left in him, but what we are next to ſpeak of; *viz.*

III. The mere *right of property*, the *jus proprietatis*, without either poſſeſſion or even the right of poſſeſſion. This is frequently ſpoken of in our books under the name of the *mere right*, *jus merum*; and the eſtate of the owner is, in ſuch caſes, ſaid to be totally deveſted, and *put to a right* (d). A perſon in this ſituation may have the true ultimate property of the lands in himſelf: but by the intervention of certain circumſtances, either by his own negligence, the ſolemn act of his anceſtor, or the determination of a court of juſtice, the preſumptive evidence of that right is ſtrongly in favour of his antagoniſt; who has thereby obtained the abſolute right of poſſeſſion. As, in the firſt place, if a perſon diſſeiſed, or turned out of poſſeſſion of his eſtate, neglects to purſue his remedy within the time limited by law:

(c) Gilb. Ten. 18. (d) Co. Litt. 345.

by this means the diſſeiſor or his heirs gain the actual right of poſſeſſion: for the law preſumes that either he had a good right originally, in virtue of which he entered on the lands in queſtion; or that ſince ſuch his entry he has procured a ſufficient title; and therefore, after ſo long an acquieſcence, the law will not ſuffer his poſſeſſion to be diſturbed without enquiring into the abſolute right of property. Yet, ſtill, if the perſon diſſeiſed or his heir hath the true right of property remaining in himſelf, his eſtate is indeed ſaid to be turned into a mere right; but, by proving ſuch his better right, he may at length recover the lands. Again; if a tenant in tail diſcontinues his eſtate-tail, by alienating the lands to a ſtranger in fee, and dies; here the iſſue in tail hath no right of *poſſeſſion*, independent of the right of *property:* for the law preſumes *prima facie*, that the anceſtor would not diſinherit, or attempt to diſinherit, his heir, unleſs he had power ſo to do; and therefore, as the anceſtor had in himſelf the right of poſſeſſion, and has transferred the ſame to a ſtranger, the law will not permit that poſſeſſion now to be diſturbed, unleſs by ſhewing the abſolute right of property to reſide in another perſon. The heir, therefore, in this caſe has only a *mere right*, and muſt be ſtrictly held to the proof of it, in order to recover the lands. Laſtly, if by accident, neglect, or otherwiſe, judgment is given for either party in any *poſſeſſory* action, (that is, ſuch wherein the right of poſſeſſion only and not that of property, is conteſted) and the other party hath indeed in himſelf the right of property, this is now turned to a *mere right*; and upon proof thereof in a ſubſequent action, denominated a writ of right, he ſhall recover his ſeiſin of the lands.

THUS, if a diſſeiſor turns me out of poſſeſſion of my lands, he thereby gains a *mere naked poſſeſſion*, and I ſtill retain the *right of poſſeſſion*, and *right of property*. If the diſſeiſor dies, and the lands deſcend to his ſon, the ſon gains an *apparent* right of *poſſeſſion*; but I ſtill retain the *actual* right both of *poſſeſſion* and *property*. If I acquieſce for thirty years with-

without bringing any action to recover poſſeſſion of the lands, the ſon gains the *actual right of poſſeſſion*, and I retain nothing but the *mere right of property*. And even this right of property will fail, or at leaſt it will be without a remedy, unleſs I purſue it within the ſpace of ſixty years. So alſo if the father be tenant in tail, and alienes the eſtate-tail to a ſtranger in fee, the alienee thereby gains the *right of poſſeſſion*, and the ſon hath only the *mere right* or *right of property*. And hence it will follow, that one man may have the *poſſeſſion*, another the *right of poſſeſſion*, and a third the *right of property*. For if tenant in tail enfeoffs A in fee-ſimple, and dies, and B diſſeiſes A; now B will have the *poſſeſſion*, A the *right of poſſeſſion*, and the iſſue in tail the *right of property*: A may recover the poſſeſſion againſt B; and afterwards the iſſue in tail may evict A, and unite in himſelf the poſſeſſion, the right of poſſeſſion, and alſo the right of property. In which union conſiſts.

IV. A COMPLETE title to lands, tenements, and hereditaments. For it is an antient maxim of the law (e), that no title is completely good, unleſs the right of poſſeſſion be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit* (f). And when to this double right the actual poſſeſſion is alſo united, when there is, according to the expreſſion of Fleta (g), *juris et ſeiſinae conjunctio*, then, and then only, is the title completely legal.

(e) Mirr. *l.* 2. *c.* 27.
(f) Co. Litt. 266. Bract. *l.* 5. *tr.* 3. *c.* 5.
(g) *l.* 3. 15. §. 5.

CHAPTER THE FOURTEENTH.

OF TITLE BY DESCENT.

THE ſeveral gradations and ſtages, requiſite to form a complete title to lands, tenements, and hereditaments, having been briefly ſtated in the preceding chapter, we are next to conſider the ſeveral manners, in which this complete title (and therein principally the right of *property*) may be reciprocally loſt and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we muſt firſt of all obſerve, that (as gain and loſs are terms of relation, and of a reciprocal nature) by whatever method one man gains an eſtate, by that ſame method or its correlative ſome other man has loſt it. As where the heir acquires by deſcent, the anceſtor has firſt loſt or abandoned the eſtate by his death: where the lord gains land by eſcheat, the eſtate of the tenant is firſt of all loſt by the natural or legal extinction of all his hereditary blood: where a man gains an intereſt by occupancy, the former owner has previouſly relinquiſhed his right of poſſeſſion: where one man claims by preſcription or immemorial uſage, another man has either parted with his right by an antient and now forgotten grant, or has forfeited it by the ſupineneſs or neglect of himſelf and his anceſtors for ages: and ſo, in caſe of forfeiture, the tenant by his own miſbehaviour or neglect has renounced his intereſt in the eſtate; whereupon it devolves to that perſon who by law may take advantage of ſuch default: and, in alienation by common aſſurances, the two conſiderations of loſs and acquiſition are ſo inter-

interwoven, and ſo conſtantly contemplated together, that we never hear of a conveyance, without at once receiving the idea as well of the grantor as the grantee.

THE methods therefore of acquiring on the one hand, and of loſing on the other, a title to eſtates in things real, are reduced by our law to two: *deſcent*, where the title is veſted in a man by the ſimple operation of law; and *purchaſe*, where the title is veſted in him by his own act or agreement (a).

DESCENT, or hereditary ſucceſſion, is the title whereby a man on the death of his anceſtor acquires his eſtate by right of repreſentation, as his heir at law. An heir therefore is he upon whom the law caſts the eſtate immediately on the death of the anceſtor: and an eſtate, ſo deſcending to the heir, is in law called the inheritance.

THE doctrine of deſcents, or law of inheritances in fee-ſimple, is a point of the higheſt importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchaſes, whereby the legal courſe of deſcent is broken and altered, perpetually refer to this ſettled law of inheritance, as a *datum*, or firſt principle, univerſally known, and upon which their ſubſequent limitations are to work. Thus a gift in tail, or to a man and the heir of his body, is a limitation that cannot be perfectly underſtood without a previous knowledge of the law of deſcents in fee-ſimple. One may well perceive, that this is an eſtate confined in its deſcent to ſuch heirs only of the donee, as have ſprung, or ſhall ſpring, from his body; but who thoſe heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldeſt, youngeſt, or other ſon alone, or all the ſons together, ſhall be his heir; this is a point, that we muſt reſult back to the ſtanding law of deſcents in fee-ſimple to be informed of.

(a) Co. Litt. 18.

IN

IN order therefore to treat a matter of this univerſal conſequence the more clearly, I ſhall endeavour to lay aſide ſuch matters as will only tend to breed embaraſſment and confuſion in our enquiries, and ſhall confine myſelf entirely to this one object. I ſhall therefore decline conſidering at preſent who are, and who are not, capable of being heirs; reſerving that for the chapter of *eſcheats*. I ſhall alſo paſs over the frequent diviſion of deſcents, into thoſe by *cuſtom*, *ſtatute*, and *common law*: for deſcents by *particular cuſtom*, as to all the ſons in gavelkind, and to the youngeſt in borough-engliſh, have already been often (b) hinted at, and may alſo be incidentally touched upon again; but will not make a ſeparate conſideration by themſelves, in a ſyſtem ſo general as the preſent: and deſcents by *ſtatute*, or fee-tail *per formam doni*, in purſuance of the ſtatute of Weſtminſter the ſecond, have alſo been already (c) copiouſly handled; and it has been ſeen that the deſcent in tail is reſtrained and regulated according to the words of the original donation, and does not entirely purſue the the common law doctrine of inheritance; which, and which only, it will now be our buſineſs to explain.

AND, as this depends not a little on the nature of kindred, and the ſeveral degrees of conſanguinity, it will be previouſly neceſſary to ſtate, as briefly as poſſible, the true notion of this kindred or alliance in blood (d).

CONSANGUINITY, or kindred, is defined by the writers on theſe ſubjects to be "*vinculum perſonarum ab eodem ſtipite deſcendentium*;" the connexion or relation of perſons deſcended from the ſame ſtock or common anceſtor. This conſanguinity is either lineal, or collateral.

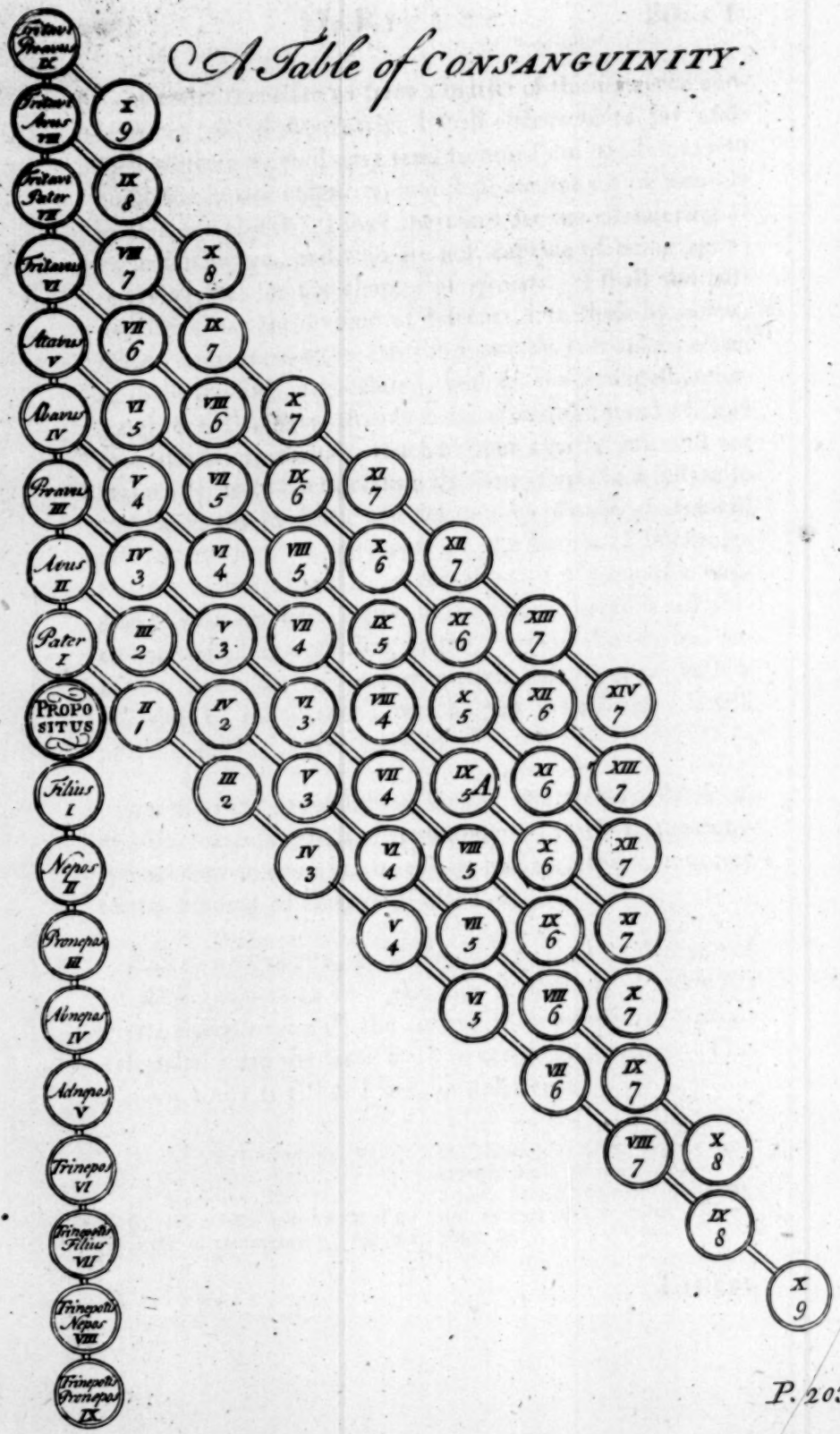
(b) See Vol. I. p. 74, 75. Vol. II. p. 83, 85.

(c) See p. 112, *&c.*

(d) For a fuller explanation of the doctrine of conſanguinity, and the conſequences reſulting from a right apprehenſion of its nature, ſee *an eſſay on collateral conſanguinity*, in the firſt volume of law tracts. *Oxon.* 1762. 8°.

LINEAL

A Table of CONSANGUINITY.



LINEAL conſanguinity is that which ſubſiſts between perſons, of whom one is deſcended in a direct line from the other: as between John Stiles (the *propoſitus* in the table of conſanguinity) and his father, grandfather, great-grandfather, and ſo upwards in the direct aſcending line; or between John Stiles and his ſon, grandſon, great-grandſon, and ſo downwards in the direct deſcending line. Every generation, in this lineal direct conſanguinity, conſtitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the firſt degree, and ſo likewiſe is his ſon; his grandſire and grandſon in the ſecond; his great-grandſire and great-grandſon in the third. This is the only natural way of reckoning the degrees in the direct line, and therefore univerſally obtains, as well in the civil (e), and canon (f), as in the common law (g).

THE doctrine of lineal conſanguinity is ſufficiently plain and obvious; but it is at the firſt view aſtoniſhing to conſider the number of lineal anceſtors which every man has, within no very great number of degrees: and ſo many different bloods (h) is a man ſaid to contain in his veins, as he hath lineal anceſtors. Of theſe he hath two in the firſt aſcending degree, his own parents; he hath four in the ſecond, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and, by the ſame rule of progreſſion, he hath an hundred and twenty eight in the ſeventh; a thouſand and twenty four in the tenth: and at the twentieth degree, or the diſtance of twenty generations, every man hath above a million of anceſtors, as common arithmetic will demonſtrate (i). This lineal conſanguinity, we may obſerve, falls ſtrictly within the definition of *vinculum perſonarum ab eodem ſtipite deſcendentium*;

(e) *Ff.* 38. 10. 10.
(f) *Decretal. l.* 4. *tit.* 14.
(g) Co. Litt. 23.
(h) *Ibid.* 12.
(i) This will ſeem ſurpriſing to thoſe who are unacquainted with the encreaſing power of progreſſive numbers; but is palpably evident from the following table of a geometrical progreſſion, in which the firſt term is 2, and the denominator alſo 2: or, to ſpeak more intelligibly, it is evident, for

ſince lineal relations are ſuch as deſcend one from the other, and both of courſe from the ſame common anceſtor.

COLLATERAL kindred anſwers to the ſame deſcription: collateral relations agreeing with the lineal in this, that they deſcend from the ſame ſtock or anceſtor; but differing in this, that they do not deſcend from each other. Collateral kinſmen are ſuch then as lineally ſpring from one and the ſame anceſtor, who is the *ſtirps*, or root, the *ſtipes*, trunk, or common ſtock, from whence theſe relations are branched out. As if John Stiles hath two ſons, who have each a numerous iſſue; both theſe iſſues are lineally deſcended from John Stiles as their common anceſtor; and they are collateral kinſmen to each other,

for that each of us has two anceſtors in the firſt degree; the number of whom is doubled at every remove, becauſe each of our anceſtors has alſo two immediate anceſtors of his own.

Lineal Degrees.	*Number of Anceſtors.*
1	2
2	4
3	8
4	16
5	32
6	64
7	128
8	256
9	512
10	1024
11	2048
12	4096
13	8192
14	16384
15	32768
16	65536
17	131072
18	262144
19	524288
20	1048576

A ſhorter method of finding the number of anceſtors at any even degree is by ſquaring the number of anceſtors at half that number of degrees. Thus 16 (the number of anceſtors at four degrees) is the ſquare of 4, the number of anceſtors at two; 256 is the ſquare of 16; 65536 of 256; and the number of anceſtors at 40 degrees would be the ſquare of 1048576, or upwards of a million of millions.

becauſe

becauſe they are all deſcended from this common anceſtor, and all have a portion of his blood in their veins, which denominates them *conſanguineos*.

We muſt be careful to remember, that the very being of collateral conſanguinity conſiſts in this deſcent from one and the ſame common anceſtor. Thus *Titius* and his brother are related; why? becauſe both are derived from one father: *Titius* and his firſt couſin are related; why? becauſe both deſcend from the ſame grandfather: and his ſecond couſin's claim to conſanguinity is this, that they both are derived from one and the ſame great-grandfather. In ſhort, as many anceſtors as a man has, ſo many common ſtocks he has, from which collateral kindred may be derived. And as we are taught by holy writ that there is one couple of anceſtors belonging to us all from whence the whole race of mankind is deſcended, the obvious and undeniable conſequence is, that all men are in ſome degree related to each other. For indeed, if we only ſuppoſe each couple of our anceſtors to have left, one with another, two children; and each of thoſe children on an average to have left two more; (and, without ſuch a ſuppoſition, the human ſpecies muſt be daily diminiſhing) we ſhall find that all of us have now ſubſiſting near two hundred and ſeventy millions of kindred in the fifteenth degree, at the ſame diſtance from the ſeveral common anceſtors as ourſelves are; beſides thoſe that are one or two deſcents nearer to or farther from the common ſtock, who may amount to as many more (k). And, if this calculation ſhould appear incompatible with the number of inhabitants on the earth, it is becauſe, by intermarriages among the ſeveral deſcendants from the ſame anceſtor, a hundred or a thouſand modes of conſanguinity may be conſolidated in one perſon, or he may be related to us a hundred or a thouſand different ways.

(k) This will ſwell more conſiderably than the former calculation: for here, though the firſt term is but 1, the denominator is 4; that is, there is *one* kinſman (a brother) in the firſt degree, who makes, togther with the *propoſitus*, the two deſcendants from the firſt couple of anceſtors; and in every

THE method of computing theſe degrees in the canon law (l), which our law has adopted (m), is as follows. We begin at the common anceſtor, and reckon downwards; and in whatſoever degree the two perſons, or the moſt remote of them, is diſtant from the common anceſtor, that is, the degree in which they are related to each other.

every other degree the number of kindred muſt be *quadruple* of thoſe in the degree which immediately precedes it. For, ſince each couple of anceſtors has two deſcendants, who increaſe in a duplicate *ratio*, it will follow that the *ratio*, in which all the deſcendants encreaſe downwards, muſt be double to that in which the anceſtors encreaſe upwards: but we have ſeen that the anceſtors encreaſe in a duplicate *ratio*: therefore the deſcendants muſt encreaſe in a double duplicate, that is, in a quadruple, *ratio*.

Collateral Degrees.	*Number of Kindred.*
1	1
2	4
3	16
4	64
5	256
6	1024
7	4096
8	16384
9	65536
10	262144
11	1048576
12	4194304
13	16777216
14	67108864
15	268435456
16	1073741824
17	4294967296
18	17179869184
19	68719476736
20	274877906944

This calculation may alſo be formed by a more compendious proceſs, *viz.* by ſquaring the couples, or half the number, of anceſtors at any given degree; which will furniſh us with the number of kindred we have in the ſame degree, at equal diſtance with ourſelves from the common ſtock, beſides thoſe at unequal diſtances. Thus, in the tenth lineal degree, the number of anceſtors is 1024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262144, or the ſquare of 512. And if we will be at the trouble to recollect the ſtate of the ſeveral families within our own knowledge, and obſerve how far they agree with this account; that is, whether, on an average, every man has not one brother or ſiſter, four firſt couſins, ſixteen ſecond couſins, and ſo on; we ſhall find that the preſent calculation is very far from being overcharged.

(l) *Decretal.* 4. 14. 3 & 9.

(m) Co. Litt. 23.

Thus

Thus *Titius* and his brother are related in the firſt degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the ſecond degree; for the nephew is two degrees removed from the common anceſtor; *viz.* his own grandfather, the father of *Titius*. Or, (to give a more illuſtrious inſtance from our Engliſh annals) king Henry the ſeventh, who ſlew Richard the third in the battle of Boſworth, was related to that prince in the fifth degree. Let the *propoſitus* therefore in the table of conſanguinity repreſent king Richard the third, and the claſs marked *(e)* king Henry the ſeventh. Now their common ſtock or anceſtor was king Edward the third, the *abavus* in the ſame table: from him to Edmond duke of York, the *proavus*, is one degree; to Richard earl of Cambridge, the *avus*, two; to Richard duke of York, the *pater*, three; to king Richard the third, the *propoſitus*, four: and from king Edward the third to John of Gaunt *(a)* is one degree; to John earl of Somerſet *(b)* two; to John duke of Somerſet *(c)* three; to Margaret counteſs of Richmond *(d)* four; to Henry the ſeventh *(e)* five. Which laſt mentioned prince, being the fartheſt removed from the common ſtock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians, (who count upwards, from either of the perſons related, to the common ſtock, and then downwards again to the other; reckoning a degree for each perſon, both aſcending and deſcending) theſe two princes were related in the ninth degree: for from king Richard the third to Richard duke of York is one degree; to Richard earl of Cambridge, two; to Edmond duke of York, three; to king Edward the third, the common anceſtor, four; to John of Gaunt, five; to John earl of Somerſet, ſix; to John duke of Somerſet, ſeven; to Margaret counteſs of Richmond, eight; to king Henry the ſeventh, nine (n).

(n) See the table of conſanguinity annexed; wherein all the degrees of collateral kindred to the *propoſitus* are computed, ſo far as the tenth of the civilians and the ſeventh of the canoniſts incluſive: the former being diſtinguiſhed by the numeral letters, the latter by the common cyphers.

THE

THE nature and degrees of kindred being thus in ſome meaſure explained, I ſhall next proceed to lay down a ſeries of rules, or canons of inheritance, according to which eſtates are tranſmitted from the anceſtor to the heir; together with an explanatory comment, remarking their original and progreſs, the reaſons upon which they are founded, and in ſome caſes their agreement with the laws of other nations.

I. THE firſt rule is, that inheritances ſhall lineally deſcend to the iſſue of the perſon laſt actually ſeiſed, *in infinitum*; but ſhall never lineally aſcend.

TO explain the more clearly both this and the ſubſequent rules, it muſt firſt be obſerved, that by law no inheritance can veſt, nor can any perſon be the actual complete heir of another, till the anceſtor is previouſly dead. *Nemo eſt haeres viventis.* Before that time the perſon who is the next in the line of ſucceſſion is called an heir apparent, or heir preſumptive. Heirs apparent are ſuch, whoſe right of inheritance is indefeaſible, provided they outlive the anceſtor; as the eldeſt ſon or his iſſue, who muſt by the courſe of the common law be heirs to the father whenever he happens to die. Heirs preſumptive are ſuch, who, if the anceſtor ſhould die immediately, would in the preſent circumſtances of things be his heirs; but whoſe right of inheritance may be defeated by the contingency of ſome nearer heir being born: as a brother, or nephew, whoſe preſumptive ſucceſſion may be deſtroyed by the birth of a child; or a daughter, whoſe preſent hopes may hereafter be cut off by the birth of a ſon. Nay, even if the eſtate hath deſcended, by the death of the owner, to ſuch brother, or nephew, or daughter; in the former caſes the eſtate ſhall be deveſted and taken away by the birth of a poſthumous child; and, in the latter, it ſhall alſo be totally deveſted by the birth of a poſthumous ſon (o).

(o) Bro. *tit. deſcent.* 58.

WE

WE muſt alſo remember, that no perſon can be properl ſuch an anceſtor, as that an inheritance in lands or tenements can be derived from him, unleſs he hath had actual ſeiſin of ſuch lands, either by his own entry, or by the poſſeſſion of his own or his anceſtor's leſſee for years, or by receiving rent from a leſſee of the freehold (p): or unleſs he hath had what is equivalent to corporal ſeiſin in hereditaments that are incorporeal; ſuch as the receipt of rent, a preſentation to the church in caſe of an advowſon (q), and the like. But he ſhall not be accounted an anceſtor, who hath had only a bare right or title to enter or be otherwiſe ſeiſed. And therefore all the caſes, which will be mentioned in the preſent chapter, are upon the ſuppoſition that the deceaſed (whoſe inheritance is now claimed) was the laſt perſon actually ſeiſed thereof. For the law requires this notoriety of poſſeſſion, as evidence that the anceſtor had that property in himſelf, which is now to be tranſmitted to his heir. Which notoriety hath ſucceeded in the place of the antient feodal inveſtiture, whereby, while feuds were precarious, the vaſal on the deſcent of lands was formerly admitted in the lord's court (as ſtill the practice in Scotland) and there received his ſeiſin in the nature of a renewal of his anceſtors grant, in the preſence of the feodal peers: till at length, when the right of ſucceſſion became indefeaſible, an entry on any part of the lands within the county (which if diſputed was afterwards to be tried by thoſe peers) or other notorious poſſeſſion, was admitted as equivalent to the formal grant of ſeiſin, and made the tenant capable of tranſmitting his eſtate by deſcent. The ſeiſin therefore of any perſon, thus underſtood, makes him the root or ſtock, from which all future inheritance, by right of blood muſt be derived: which is very briefly expreſſed in this maxim, *ſeiſina facit ſtipitem* (r).

(p) Co. Litt. 15.
(q) *Ibid.* 11.
(r) Flet. *l.* 6. *c.* 2. §. 2.

WHEN therefore a perſon dies ſo ſeiſed, the inheritance firſt goes to his iſſue: as if there be Geoffrey, John, and Matthew, grandfather, father, and ſon; and John purchaſes land and dies; his ſon Matthew ſhall ſucceed him as heir, and not the grandfather Geoffrey; to whom the land ſhall never aſcend, but ſhall rather eſcheat to the lord (s).

THIS rule, ſo far as it is affirmative and relates to lineal deſcents, is almoſt univerſally adopted by all nations; and it ſeems founded on a principle of natural reaſon, that (whenever a right of property tranſmiſſible to repreſentatives is admitted) the poſſeſſions of the parents ſhould go, upon their deceaſe, in the firſt place to their children, as thoſe to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total excluſion of parents and all lineal anceſtors from ſucceeding to the inheritance of their offspring, is peculiar to our own laws, and ſuch as have been deduced from the ſame original. For, by the Jewiſh law, on failure of iſſue the father ſucceeded to the ſon, in excluſion of brethren, unleſs one of them married the widow and raiſed up ſeed to his brother (t). And, by the laws of Rome, in the firſt place the children of lineal deſcendants were preferred; and, on failure of theſe, the father and mother or lineal aſcendants ſucceeded together with the brethren and ſiſters (v); though by the law of the twelve tables the mother was originally, on account of her ſex, excluded (u). Hence this rule of our laws has been cenſured and declaimed againſt as abſurd and derogating from the maxims of equity and natural juſtice (w). Yet that there is nothing unjuſt or abſurd in it, but that on the contrary it is founded upon very good reaſon, may appear from conſidering as well the nature of the rule itſelf, as the occaſion of introducing it into our laws.

(s) Litt. §. 3.
(t) Selden. *de ſucceſſ. Ebraeor.* c. 12.
(v) *Ff.* 38. 15. 1. *Nov.* 118. 127.
(u) *Inſt.* 3. 3. 1.
(w) Crag. *de jur. feud.* l. 2. t. 13. §. 15. Locke on gov. part. 1. §. 90.

WE

WE are to reflect, in the firſt place, that all rules of ſucceſſion to eſtates are creatures of the civil policy, and *juris poſitivi* merely. The right of property, which is gained by occupancy, extends naturally no farther than the life of the preſent poſſeſſor; after which the land by the law of nature would again become common, and liable to be ſeiſed by the next occupant: but ſociety, to prevent the miſchiefs that might enſue from a doctrine ſo productive of contention, has eſtabliſhed conveyances, wills, and ſucceſſions; whereby the property originally gained by poſſeſſion is continued, and tranſmitted from one man to another, according to the rules which each ſtate has reſpectively thought proper to preſcribe. There is certainly therefore no injuſtice done to individuals, whatever be the path of deſcent marked out by the municipal law.

IF we next conſider the time and occaſion of introducing this rule into our law, we ſhall find it to have been grounded upon very ſubſtantial reaſons. I think there is no doubt to be made, but that it was introduced at the ſame time with, and in conſequence of, the feodal tenures. For it was an expreſs rule of feodal law (x) that *ſucceſſionis feudi talis eſt natura, quod aſcendentes non ſuccedunt*; and therefore the ſame maxim obtains alſo in the French law to this day (y). Our Henry the firſt indeed, among other reſtorations of the old Saxon laws, reſtored the right of ſucceſſion in the aſcending line (z), but this ſoon fell again into diſuſe; for ſo early as Glanvil's time, who wrote under Henry the ſecond, we find it laid down as eſtabliſhed law (a), that *haereditas nunquam aſcendit*; which has remained an invariable maxim ever ſince. Theſe circumſtances evidently ſhew this rule to be of feodal original; and taken in that light, there are ſome arguments in its favour, beſides thoſe which are drawn merely from the reaſon of the thing. For if the feud, of which the ſon died

(x) 2 *Feud.* 50.
(y) Domat. *p.* 2. *l.* 2. *t.* 2. Monteſqu. *Eſp. L.* 31. *c.* 33.
(z) *LL. Hen. I. c.* 70.
(a) *l.* 7. *c.* 1.

ſeiſed, was really *feudum antiquum*, or one deſcended to him from his anceſtors, the father could not poſſibly ſucceed to it, becauſe it muſt have paſſed him in the courſe of deſcent, before it could come to the ſon; unleſs it were *feudum maternum*, or one deſcended from his mother, and then for other reaſons (which will appear hereafter) the father could in no wiſe inherit it. And if it were *feudum novum*, or one newly acquired by the ſon, then only the deſcendants from the body of the feudatory himſelf could ſucceed, by the known maxim of the early feodal conſtitutions (b), which was founded as well upon the perſonal merit of the vaſal, which might be tranſmitted to his children, but could not aſcend to his progenitors, as alſo upon this conſideration of military policy, that the decrepid grandſire of a vigorous vaſal would be but indifferently qualified to ſucceed him in his feodal ſervices. Nay, even if this *feudum novum* were held by the ſon *ut feudum antiquum*, or with all the qualities annexed of a feud deſcended from his anceſtors, ſuch feud muſt in all reſpects have deſcended as if it had been really an antient feud; and therefore could not go to the father, becauſe, if it had been an antient feud, the father muſt have been dead before it could have come to the ſon. Thus whether the feud was ſtrictly *novum*, or ſtrictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of theſe caſes the father could poſſibly ſucceed. Theſe reaſons, drawn from the hiſtory of the rule itſelf, ſeem to be more ſatisfactory than that quaint one of Bracton (c), adopted by ſir Edward Coke (d), which regulates the deſcent of lands according to the laws of gravitation.

II. A SECOND general rule or canon is, that the male iſſue ſhall be admitted before the female.

(b) *Feud.* 20.

(c) *Deſcendit itaque jus, quaſi ponderoſum quid, cadens deorſum recta linea, et nunquam reaſcendit. l.* 2. *c.* 29.

(d) 1 Inſt. 11.

THUS

THUS ſons ſhall be admitted before daughters; or, as our male lawgivers have ſomewhat uncomplaiſantly expreſſed it, the worthieſt of blood ſhall be preferred (e). As if John Stiles hath two ſons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; firſt Matthew, and (in caſe of his death without iſſue) then Gilbert, ſhall be admitted to the ſucceſſion in preference to both the daughters.

THIS preference of males to females is entirely agreeable to the law of ſucceſſion among the Jews (f), and alſo among the ſtates of Greece, or at leaſt among the Athenians (g); but was totally unknown to the laws of Rome (h), (ſuch of them, I mean, as are at preſent extant) wherein brethren and ſiſters were allowed to ſucceed to equal portions of the inheritance. I ſhall not here enter into the comparative merit of the Roman and the other conſtitutions in this particular, nor examine into the greater dignity of blood in the male or female ſex; but ſhall only obſerve, that our preſent preference of males to females ſeems to have ariſen entirely from the feodal law. For though our Britiſh anceſtors, the Welſh, appear to have given a preference to males (i), yet our ſubſequent Daniſh predeceſſors ſeem to have made no diſtinction of ſexes, but to have admitted all the children at once to the inheritance (k). But the feodal law of the Saxons on the continent (which was probably brought over hither, and firſt altered by the law of King Canute) gives an evident preference of the male to the female ſex. "*Pater aut mater, defuncti, filio non filiae* "*haereditatem relinquent. . . . . Qui defunctus non filios* "*ſed filias reliquerit, ad eas omnis haereditas pertineat* (l)." It is poſſible therefore that this preference might be a branch of that imperfect ſyſtem of feuds, which obtained here before the conqueſt; eſpecially as it ſubſiſts among the cuſ-

(e) Hal. H. C. L. 235.
(f) Numb. c. 27.
(g) Petit. *LL. Attic. l. 6. t. 6.*
(h) *Inſt.* 3. 1. 6.
(i) *Stat. Wall.* 12. Edw. 1.
(k) *LL. Canut. c.* 68.
(l) *tit.* 7. §. 1. & 4.

toms of gavelkind, and as, in the charter or laws of king Henry the firſt, it is not (like many Norman innovations) given up, but rather enforced (m). The true reaſon of preferring the males muſt be deduced from feodal principles: for, by the genuine and original policy of that conſtitution, no female could ever ſucceed to a proper feud (n), inaſmuch as they were incapable of performing thoſe military ſervices, for the ſake of which that ſyſtem was eſtabliſhed. But our law does not extend to a total excluſion of females, as the Salic law and others, where feuds were moſt ſtrictly retained: it only poſtpones them to males; for, though daughters are excluded by ſons, yet they ſucceed before any collateral relations: our law like that of the Saxon feudiſts before-mentioned, thus ſteering a middle courſe, between the abſolute rejection of females, and the putting them on a footing with males.

III. A THIRD rule, or canon of deſcent, is this; that, where there are two or more males in equal degree, the eldeſt only ſhall inherit; but the females all together.

As if a man hath two ſons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his eldeſt ſon ſhall alone ſucceed to his eſtate, in excluſion of Gilbert the ſecond ſon and both the daughters: but, if both the ſons die without iſſue before the father, the daughters Margaret and Charlotte ſhall both inherit the eſtate as coparceners (o).

THIS right of primogeniture in males ſeems antiently to have only obtained among the Jews, in whoſe conſtitution the eldeſt ſon had a double portion of the inheritance (p); in the ſame manner as with us, by the laws of king Henry the firſt (q), the eldeſt ſon had the capital fee or principal feud of his father's poſſeſſions, and no other pre-emi-

(m) *c.* 70.
(n) 1 *Feud.* 8.
(o) Litt. §. 5. Hale. H. C. L. 238.
(p) Selden. *de ſucc. Ebr. c.* 5.
(q) *c.* 70.

nence;

nence; and as the eldeſt daughter had afterwards the principal manſion, when the eſtate deſcended in coparcenary, (r). The Greeks, the Romans, the Britons, the Saxons, and even originally the feudiſts, divided the lands equally; ſome among all the children at large, ſome among the males only. This is certainly the moſt obvious and natural way; and has the appearance, at leaſt in the opinion of younger brothers, of the greateſt impartiality and juſtice. But when the emperors began to create honorary feuds, or titles of nobility, it was found neceſſary (in order to preſerve their dignity) to make them impartible (s), or (as they ſtiled them) *feuda individua*, and in conſequence deſcendible to the eldeſt ſon alone. This example was farther enforced by the inconvenience that attended the ſplitting of eſtates; namely, the diviſion of the military ſervices, the multitude of infant tenants incapable of performing any duty, the conſequential weakening of the ſtrength of the kingdom, and the inducing younger ſons to take up with the buſineſs and idleneſs of a country life, inſtead of being ſerviceable to themſelves and the public, by engaging in mercantile, in military, in civil, or in eccleſiaſtical employments (t). Theſe reaſons occaſioned an almoſt total change in the method of feodal inheritances abroad; ſo that the eldeſt male began univerſally to ſucceed to the whole of the lands in all military tenures: and in this condition the feodal conſtitution was eſtabliſhed in England by William the conqueror.

YET we find, that ſocage eſtates frequently deſcended to all the ſons equally, ſo lately as when Glanvil (u) wrote, in the reign of Henry the ſecond; and it is mentioned in the mirror (w) as a part of our antient conſtitution, that knights' fees ſhould deſcend to the eldeſt ſon, and ſocage fees ſhould be partible among the male children. However in Henry the third's time we find by Bracton (x) that ſocage lands, in imitation of lands in chivalry, had al-

(r) Glanvil. *l.* 7. *c.* 3.
(s) 2 *Feud.* 55.
(t) Hale. H. C. L. 221.
(u) *l.* 7. *c.* 3.
(w) *c.* 1. § 3.
(x) *l.* 2. *c.* 30, 31.

moſt entirely fallen into the right of ſucceſſion by primogeniture, as the law now ſtands: except in Kent, where they gloried in the preſervation of their antient gavelkind tenure, of which a principal branch was the joint inheritance of all the ſons (y); and except in ſome particular manors and townſhips, where their local cuſtoms continued the deſcent, ſometimes to all, ſometimes to the youngeſt ſon only, or in other more ſingular methods of ſucceſſion.

As to the females, they are ſtill left as they were by the antient law: for they were all equally incapable of performing any perſonal ſervice; and therefore one main reaſon of preferring the eldeſt ceaſing, ſuch preference would have been injurious to the reſt: and the other principal purpoſe, the prevention of the too minute ſubdiviſion of eſtates, was left to be conſidered and provided for by the lords, who had the diſpoſal of theſe female heireſſes in marriage. However, the ſucceſſion by primogeniture, even among females, took place as to the inheritance of the crown (z); wherein the neceſſity of a ſole and determinate ſucceſſion is as great in the one ſex as the other. And the right of the ſole ſucceſſion, though not of primogeniture, was alſo eſtabliſhed with reſpect to female dignities and titles of honour. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldeſt ſhall not of courſe be counteſs, but the dignity is in ſuſpenſe or abeyance till the king ſhall declare his pleaſure; for he, being the fountain of honour, may confer it on which of them he pleaſes (a). In which diſpoſition is preſerved a ſtrong trace of the antient law of feuds before their deſcent by primogeniture even among the males was eſtabliſhed; namely, that the lord might beſtow them on which of the ſons he thought proper:—"*progreſſum eſt, ut ad filios deveniret, in quam ſcilicet dominus hoc vellet beneficium confirmare* (b)."

(y) Somner. Gavelk. 7.
(z) Co. Litt. 165.
(a) *Ibid.*
(b) 1 *Feud.* 1.

IV. A FOURTH rule, or canon of deſcents, is this; that the lineal deſcendants, *in infinitum*, of any perſon deceaſed ſhall repreſent their anceſtor; that is, ſhall ſtand in the ſame place as the perſon himſelf would have done, had he been living.

THUS the child, grandchild, or great-grandchild (either male or female) of the eldeſt ſon ſucceeds before the younger ſon, and ſo *in infinitum* (c). And theſe repreſentatives ſhall take neither more nor leſs, but juſt ſo much as their principals would have done. As if there be two ſiſters, Margaret and Charlotte; and Margaret dies, leaving ſix daughters; and then John Stiles the father of the two ſiſters dies, without other iſſue: theſe ſix daughters ſhall take among them exactly the ſame as their mother Margaret would have done, had ſhe been living; that is, a moiety of the lands of John Stiles in coparcenary; ſo that, upon partition made, if the land be divided into twelve parts, thereof Charlotte, the ſurviving ſiſter ſhall have ſix, and her ſix nieces, the daughters of Margaret, one apiece.

THIS taking by repreſentation is called a ſucceſſion *in ſtirpes*, according to the roots; ſince all the branches inherit the ſame ſhare that their root whom they repreſent, would have done. And in this manner alſo was the Jewiſh ſucceſſion directed (d); but the Roman ſomewhat differed from it. In the deſcending line the right of repreſentation continued *in infinitum*, and the inheritance ſtill deſcended *in ſtirpes:* as if one of three daughters died, leaving ten children, and then the father died; the two ſurviving daughters had each one third of his effects, and the ten grandchildren had the remaining third divided between them. And ſo among collaterals, if any perſons of equal degree with the perſons repreſented were ſtill ſubſiſting, (as if the deceaſed left one brother, and two nephews the ſons of another brother) the ſucceſſion was ſtill guided by the *roots:* but, if both the brethren were dead leaving iſſue, then (I

(c) Hale. H. C. L. 236, 237. (d) Selden. *de ſucc. Ebr. c.* 1.

appre-

apprehend) their repreſentatives in equal degree became themſelves principals, and ſhared the inheritance *per capita*, that is, ſhare and ſhare alike; they being themſelves now the next in degree to the anceſtor, in their own right, and not by right of repreſentation (e). So, if the next heirs of *Titius* be ſix nieces, three by one ſiſter, two by another, and one by a third; his inheritance by the Roman law was divided into ſix parts, and one given to each of the nieces: whereas the law of England in this caſe would ſtill divide it only into three parts, and diſtribute it *per ſtirpes*, thus; one third to the three children who repreſent one ſiſter, another third to the two who repreſent the ſecond, and the remaining third to the one child who is the ſole repreſentative of her mother.

THIS mode of repreſentation is a neceſſary conſequence of the double preference given by our law, firſt to the male iſſue, and next to the firſt-born among the males, to both which the Roman law is a ſtranger. For if all the children of three ſiſters were in England to claim *per capita*, in their own rights as next of kin to the anceſtor, without any reſpect to the ſtocks from whence they ſprung, and thoſe children were partly male and partly female; then the eldeſt male among them would exclude not only his own brethren and ſiſters, but all the iſſue of the other two daughters; or elſe the law in this inſtance muſt be inconſiſtent with itſelf, and depart from the preference which it conſtantly gives to the males, and the firſt-born, among perſons in equal degree. Whereas by dividing the inheritance according to the roots or *ſtirpes*, the rule of deſcent is kept uniform and ſteady: the iſſue of the eldeſt ſon excludes all other pretenders, as the ſon himſelf (if living) would have done; but the iſſue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the ſame: and among theſe ſeveral iſſues, or repreſentatives of the reſpective roots, the ſame preference to males and the ſame right of primogeniture obtain, as would have obtained at the firſt among the roots themſelves, the ſons

(e) *Nov.* 118. *c.* 3. *Inſt.* 3. 1. 6.

or

or daughters of the deceaſed. As if a man hath two ſons, A and B, and A dies, leaving two ſons, and then the grandfather dies; now the eldeſt ſon of A ſhall ſucceed to the whole of his grandfather's eſtate: and if A had left only two daughters, they ſhould have ſucceeded alſo to equal moieties of the whole, in excluſion of B and his iſſue. But if a man hath only three daughters, C, D, and E; and C dies leaving two ſons, D leaving two daughters, and E leaving a daughter and a ſon, who is younger than his ſiſter: here, when the grandfather dies, the eldeſt ſon of C ſhall ſucceed to one third, in excluſion of the younger; the two daughters of D to another third in partnerſhip; and the ſon of E to the remaining third, in excluſion of his elder ſiſter. And the ſame right of repreſentation, guided and reſtrained by the ſame rules of deſcent, prevails downwards *in infinitum*.

YET this right does not appear to have been thoroughly eſtabliſhed in the time of Henry the ſecond, when Glanvil wrote; and therefore, in the title to the crown, eſpecially, we find frequent conteſts between the younger (but ſurviving) brother, and his nephew (being the ſon and repreſentative of the elder deceaſed) in regard to the inheritance of their common anceſtor: for the uncle is certainly nearer of kin to the common ſtock, by one degree, than the nephew; though the nephew, by repreſenting his father, has in him the right of primogeniture. The uncle alſo was uſually better able to perform the ſervices of the fief; and beſides had frequently ſuperior intereſt and ſtrength, to back his pretenſions and cruſh the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of repreſentative primogeniture; that is, the younger ſurviving brother is admitted to the inheritance before the ſon of an elder deceaſed: which occaſioned the diſputes between the two houſes of Mecklenburgh, Schwerin and Strelitz, in 1692 (f). Yet Glanvil, with us, even in the twelfth century, ſeems (g) to declare for the right of the nephew by repreſentation; provided the eldeſt ſon had not received a proviſion in lands from his father, (or as the ci-

(f) Mod. Un. Hiſt. xlii. 334. (g) *l.* 7. *c.* 3.

vil

vil law would call it) had not been forisfamiliated, in his life-time. King John, however, who kept his nephew Arthur from the throne, by diſputing the right of repreſentation, did all in his power to aboliſh it throughout the realm (h): but in the time of his ſon, king Henry the third, we find the rule indiſputably ſettled in the manner we have here laid it down (i), and ſo it has continued ever ſince. And thus much for lineal deſcents.

V. A FIFTH rule is, that, on failure of lineal deſcendants, or iſſue, of the perſon laſt ſeiſed, the inheritance ſhall deſcend to the blood of the firſt purchaſor; ſubject to the three preceding rules.

THUS if Geoffrey Stiles purchaſes land, and it deſcends to John Stiles his ſon, and John dies ſeiſed thereof without iſſue; whoever ſucceeds to this inheritance muſt be of the blood of Geoffrey the firſt purchaſor of this family (k). The firſt purchaſor, *perquiſitor*, is he who firſt acquired the eſtate to his family, whether the ſame was transferred to him by ſale, or by gift, or by any other method, except only that of deſcent.

THIS is a rule almoſt peculiar to our own laws, and thoſe of a ſimilar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whoſe laws looked any farther than the perſon himſelf who died ſeiſed of the eſtate; but aſſigned him an heir, without conſidering by what title he gained it, or from what anceſtor he derived it. But the law of Normandy (l) agrees with our law in this reſpect: nor indeed is that agreement to be wondered at, ſince the law of deſcents in both is of feodal original; and this rule or canon cannot otherwiſe be accounted for than by recurring to feodal principles.

WHEN feuds firſt began to be hereditary, it was made a neceſſary qualification of the heir, who would ſucceed to a feud, that he ſhould be of the blood of, that is, lineally de-

(h) Hale. H. C. L. 217. 229.
(i) Bracton. *l.* 2. *c.* 30. §. 2.
(k) Co. Litt. 12.
(l) *Gr. Couſtum. c.* 25.

ſcended

ſcended from, the firſt feudatory or purchaſor. In conſequence whereof, if a vaſal died poſſeſſed of a feud of his own acquiring, or *feudum novum*, it could not deſcend to any but his own offspring; no, not even to his brother, becauſe he was not deſcended, nor derived his blood, from the firſt acquirer. But if it was *feudum antiquum*, that is, one deſcended to the vaſal from his anceſtors, then his brother, or ſuch other collateral relation as was deſcended and derived his blood from the firſt feudatory, might ſucceed to ſuch inheritance. To this purpoſe ſpeaks the following rule; "*frater fratri ſine legitimo haerede defuncto, in beneficio quod* "*eorum patris fuit, ſuccedat: ſin autem unus e fratribus a* "*domino feudum acceperit, eo defuncto ſine legitimo haerede,* "*frater ejus in feudum non ſuccedit* (m)." The true feodal reaſon for which rule was this; that what was given to a man, for his perſonal ſervice and perſonal merit, ought not to deſcend to any but the heirs of his perſon. And therefore, as in eſtates-tail, (which a proper feud very much reſembled) ſo in the feodal donation, "*nomen haeredis, in prima inveſti-*"*tura expreſſum, tantum ad deſcendentes ex corpore primi* "*vaſalli extenditur*; *et non ad collaterales, niſi ex corpore* "*primi vaſalli ſive ſtipitis deſcendant* (n):" the will of the donor or original lord, (when feuds were turned from life eſtates into inheritances) not being to make them abſolutely hereditary, like the Roman *allodium*, but hereditary only *ſub modo*; not hereditary to the collateral relations, or lineal anceſtors, or huſband, or wife of the feudatory, but to the iſſue deſcended from his body only.

HOWEVER, in proceſs of time, when the feodal rigour was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his anceſtors; and then the collateral relations were admitted to ſucceed even *in infinitum*, becauſe they might have been of the blood of, that is, deſcended from, the firſt imaginary pur-

(m) 2 *Feud.* 1. §. 2. (n) Craig. *l.* 1. *t.* 9. §. 36.

chaſor.

chaſor. For ſince it is not aſcertained in ſuch general grants, whether this feud ſhall be held *ut feudum paternum*, or *feudum avitum*, but *ut feudum antiquum* merely, as a feud of indefinite antiquity; that is, ſince it is not aſcertained from which of the anceſtors of the grantee this feud ſhall be ſuppoſed to have deſcended; the law will not aſcertain it, but will ſuppoſe *any* of his anceſtors, *pro re nata*, to have been the firſt purchaſor: and therefore it admits *any* of his collateral kindred (who have the other neceſſary requiſites) to the inheritance, becauſe every collateral kinſman muſt be deſcended from ſome one of his lineal anceſtors.

OF this nature are all the grants of fee-ſimple eſtates of this kingdom; for there is now in the law of England no ſuch thing as a grant of a *feudum novum*, to be held *ut novum*; unleſs in the caſe of fee-tail, and there we ſee that this rule is ſtrictly obſerved, and none but the lineal deſcendants of the firſt donee (or purchaſor) are admitted: but every grant of lands in fee-ſimple is with us a *feudum novum* to be held *ut antiquum*, as a feud whoſe antiquity is indefinite; and therefore the collateral kindred of the grantee, or deſcendants from any of his lineal anceſtors, by whom the lands might have poſſibly been purchaſed, are capable of being called to the inheritance.

YET, when an eſtate hath really deſcended in a courſe of inheritance to the perſon laſt ſeiſed, the ſtrict rule of the feodal law is ſtill obſerved; and none are admitted, but the heirs of thoſe through whom the inheritance hath paſſed: for all others have demonſtrably none of the blood of the firſt purchaſor in them, and therefore ſhall never ſucceed. As, if lands come to John Stiles by deſcent from his mother Lucy Baker, no relation of his father (as ſuch) ſhall ever be his heir of theſe lands; and, *vice verſa*, if they deſcended from his father Geoffrey Stiles, no relation of his mother (as ſuch) ſhall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any ſhare of his father's blood. And ſo, if the eſtate deſcended from his father's father, George Stiles;

Stiles; the relations of his father's mother, Cecilia Kempe, ſhall, for the ſame reaſon, never be admitted, but only thoſe of his father's father. This is alſo the rule of the French law (o), which is derived from the ſame feodal fountain.

HERE we may obſerve, that, ſo far as the feud is really *antiquum*, the law traces it back, and will not ſuffer any to inherit but the blood of thoſe anceſtors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited from his father Walter Stiles, or his mother Chriſtian Smith; or if it appear that his grandfather was the firſt grantee, and ſo took it (by the general law) as a feud of indefinite antiquity; in either of theſe caſes the law admits the deſcendants of any anceſtor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this eſtate; becauſe in the firſt caſe it is really uncertain, and in the ſecond caſe it is ſuppoſed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

THIS then is the great and general principle, upon which the law of collateral inheritance depends; that, upon failure of iſſue in the laſt proprietor, the eſtate ſhall deſcend to the blood of the firſt purchaſor; or, that it ſhall reſult back to the heirs of the body of that anceſtor, from whom it either really has, or is ſuppoſed by fiction of law to have, originally deſcended: according to the rule laid down in the year-books (p), Fitzherbert (q), Brook (r), and Hale (s); "that he who would have been heir to the fa-"ther of the deceaſed" (and, of courſe, to the mother, or any other purchaſing anceſtor) "ſhall alſo be heir to the ſon."

THE remaining rules are only rules of evidence, calculated to inveſtigate who that purchaſing anceſtor was;

(o) Domat. *part* 2. *pr.*
(p) *M.* 12. *Edw.* IV. 14.
(q) *Abr. t. deſcent.* 2.
(r) *Ibid.* 38.
(s) H. C. L. 243.

which,

which, *in feudis vere antiquis*, has, in proceſs of time, been forgotten, and is ſuppoſed ſo to be in feuds that are held *ut antiquis*.

VI. A SIXTH rule or canon therefore is, that the collateral heir of the perſon laſt ſeiſed muſt be his next collateral kinſman, of the whole blood.

FIRST, he muſt be his next collateral kinſman, either perſonally or *jure repreſentationis*; which proximity is reckoned according to the canonical degrees of conſanguinity before-mentioned. Therefore, the brother being in the firſt degree, he and his deſcendants ſhall exclude the uncle and his iſſue, who is only in the ſecond. And herein conſiſts the true reaſon of the different methods of computing the degrees of conſanguinity, in the civil law on the one hand, and in the canon and common laws on the other. The civil law regards conſanguinity principally with reſpect to ſucceſſions, and therein very naturally conſiders only the perſon deceaſed, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of perſons through whom the claim muſt be derived from him; and makes not only his great-nephew but alſo his firſt-couſin to be both related to him in the fourth degree; becauſe there are three perſons between him and each of them. The canon law regards conſanguinity principally with a view to prevent inceſtuous marriages, between thoſe who have a large portion of the ſame blood running in their reſpective veins; and therefore looks up to the author of that blood, or the common anceſtor, reckoning the degrees from him: ſo that the great-nephew is related in the third canonical degree to the perſon propoſed, and the firſt couſin in the ſecond; the former being diſtant three degrees from the common anceſtor, and therefore deriving only one fourth of his blood from the ſame fountain with the *propoſitus*; the latter, and alſo the *propoſitus*, being each of them diſtant only two degrees from the common anceſtor, and therefore having one half of each of their bloods the ſame. The common law regards conſanguinity principally with reſpect to deſcents; and, having therein the ſame object in view

view as the civil, it may ſeem as if it ought to proceed according to the civil computation. But as it alſo reſpects the purchaſing anceſtor, from whom the eſtate was derived, it therein reſembles the canon law, and therefore counts its degrees in the ſame manner. Indeed the deſignation of perſon (in ſeeking for the next of kin) will come to exactly the ſame end (though the degrees will be differently numbered) whichever method of computation we ſuppoſe the law of England to uſe, ſince the right of repreſentation (of the father by the ſon, *&c.*) is allowed to prevail *in infinitum*. This allowance was abſolutely neceſſary, elſe there would have frequently been many claimants in exactly the ſame degree of kindred as (for inſtance) uncles and nephews of the deceaſed; which multiplicity, though no inconvenience in the Roman law of partible inheritances, yet would have been productive of endleſs confuſion where the right of ſole ſucceſſion, as with us, is eſtabliſhed. The iſſue or deſcendants therefore of John Stiles's brother are all of them in the firſt degree of kindred with reſpect to inheritances, as their father alſo, when living, was; thoſe of his uncle in the ſecond; and ſo on; and are ſeverally called to the ſucceſſion in right of ſuch their repreſentative proximity.

THE right of repreſentation being thus eſtabliſhed, the former part of the preſent rule amounts to this; that, on failure of iſſue of the perſon laſt ſeiſed, the inheritance ſhall deſcend to the iſſue of his next immediate anceſtor. Thus if John Stiles dies without iſſue, his eſtate ſhall deſcend to Francis his brother, who is lineally deſcended from Geoffrey Stiles his next immediate anceſtor, or father. On failure of brethren, or ſiſters, and their iſſue, it ſhall deſcend to the uncle of John Stiles, the lineal deſcendant of his grandfather George, and ſo on *in infinitum*. Very ſimilar to which was the law of inheritance among the antient Germans, our progenitors: "*haeredes ſucceſſoreſque ſui cuique* "*liberi, et nullum teſtamentum: ſi liberi non ſunt, proximus* "*gradus in poſſeſſione, fratres, patrui, avunculi* (t)."

(t) Tacitus *de mor. Germ.* 21.

Now here it muſt be obſerved, that the lineal anceſtors, though (according to the firſt rule) incapable themſelves of ſucceeding to the eſtate, becauſe it is ſuppoſed to have already paſſed them, are yet the common ſtocks from which the next ſucceſſor muſt ſpring. And therefore in the Jewiſh law, which in this reſpect entirely correſponds with ours (u), the father or other lineal anceſtor, is himſelf ſaid to be the heir, though long ſince dead, as being repreſented by the perſons of his iſſue; who are held to ſucceed not in their own rights, as brethren, uncles, *&c.* but in the right of repreſentation, as the ſons of the father, grandfather, *&c.* of the deceaſed (v). But, though the common anceſtor be thus the root of the inheritance, yet with us it is not neceſſary to *name* him in making out the pedigree or deſcent. For the deſcent between two brothers is held to be an *immediate* deſcent; and therefore title may be made by one brother or his repreſentatives *to* or *through* another, without mentioning their common father (w). If Geoffrey Stiles hath two ſons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey: and ſo the ſon of Francis may claim as couſin and heir to Matthew the ſon of John, without naming the grandfather; viz. as ſon of Francis, who was the brother of John, who was the father of Matthew. But though the common anceſtors are not named in deducing the pedigree, yet the law ſtill reſpects them as the fountains of inheritable blood: and therefore in order to aſcertain the collateral heir of John Stiles, it is in the firſt place neceſſary to recur to his anceſtors in the firſt degree; and if they have left any other iſſue beſides John, that iſſue will be his heir. On default of ſuch, we muſt aſcend one ſtep higher to the anceſtors in the ſecond degree, and then to thoſe in the third and fourth, and ſo upwards *in infinitum*; till ſome anceſtors be found, who have other iſſue deſcending from them beſides the deceaſed, in a parallel or collateral line. From theſe anceſtors the heir of John Stiles muſt derive his deſcent; and in ſuch derivation the ſame rules muſt be obſerved, with regard to

(u) Numb. c. 27.
(v) Selden. *de ſucc. Ebr. c.* 12.
(w) 1 Sid. 193. 1 Lev. 60. 12 Mod. 619.

ſex,

ſex, primogeniture, and repreſentation, that have juſt been laid down with regard to lineal deſcents from the perſon of the laſt proprietor.

BUT, ſecondly, the heir need not be the neareſt kinſman abſolutely, but only *ſub modo*; that is, he muſt be the neareſt kinſman of the whole blood, for, if there be a much nearer kinſman of the half blood, a diſtant kinſman of the whole blood ſhall be admitted, and the other intirely excluded.

A KINSMAN of the whole blood is he that is derived, not only from the ſame anceſtor, but from the ſame couple of anceſtors. For, as every man's own blood is compounded of the bloods of his reſpective anceſtors, he only is properly of the whole or entire blood with another, who hath (ſo far as the diſtance of degrees will permit) all the ſame ingredients in the compoſition of his blood that the other hath. Thus, the blood of John Stiles being compoſed of thoſe of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being deſcended from both the ſame parents, hath entirely the ſame blood with John Stiles; or, he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a ſecond huſband, Lewis Gay, and hath iſſue by him; the blood of this iſſue being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (inſtead of Geoffrey Stiles) on the other part, it hath therefore only half the ſame ingredients with that of John Stiles; ſo that he is only his brother of the half blood, and for that reaſon they ſhall never inherit to each other. So alſo, if the father has two ſons, A and B, by different venters or wives; now theſe two brethren are not brethren of the whole blood, and therefore ſhall never inherit to each other, but the eſtate ſhall rather eſcheat to the lord. Nay, even if the father dies, and his lands deſcend to his eldeſt ſon A, who enters thereon, and dies ſeiſed without iſſue; ſtill B ſhall not be heir to his eſtate, becauſe he is only of the half blood to A, the perſon laſt ſeiſed: but, had A died without

entry, then B might have inherited; not as heir to A his half-brother, but as heir to their common father, who was the perſon laſt actually ſeiſed (x).

THIS total excluſion of the half blood from the inheritance, being almoſt peculiar to our own law, is looked upon as a ſtrange hardſhip by ſuch as are unacquainted with the reaſons on which it is grounded. But theſe cenſures ariſe from a miſapprehenſion of the rule; which is not ſo much to be conſidered in the right of a rule of deſcent, as of a rule of evidence; an auxiliary rule, to carry a former into execution. And here we muſt again remember, that the great and moſt univerſal principle of collateral inheritances being this, that an heir to *feudum antiquum* muſt be of the blood of the firſt feudatory or purchaſor, that is, derived in a lineal deſcent from him; it was originally requiſite, as upon gifts in tail it ſtill is, to make out the pedigree of the heir from the firſt donee or purchaſor, and to ſhew that ſuch heir was his lineal repreſentative. But when, by length of time and a long courſe of deſcents, it came (in thoſe rude and unlettered ages) to be forgotten who was really the firſt feudatory or purchaſor, and thereby the proof of an actual deſcent from him became impoſſible; then the law ſubſtituted what ſir Martin Wright (y) calls a *reaſonable*, in the ſtead of an *impoſſible*, proof: for it remits the proof of an actual deſcent from the firſt purchaſor; and only requires, in lieu of it, that the claimant be next of the whole blood to the perſon laſt in poſſeſſion; (or derived from the ſame couple of anceſtors) which will probably anſwer the ſame end as if he could trace his pedigree in a direct line from the firſt purchaſor. For he who is my kinſman of the whole blood can have no anceſtors beyond or higher than the common ſtock, but what are equally my anceſtors alſo; and mine are *vice verſa* his: he therefore is very likely to be derived from that unknown anceſtor of mine, from whom the inheritance deſcended. But a kinſman of the half blood has but one half of his anceſtors above the common ſtock the ſame as mine; and therefore there is not the ſame

(x) Hale. H. C. L. 238. (y) Tenures. 186.

probability

probability of that ſtanding requiſite in the law, that he be derived from the blood of the firſt purchaſor.

To illuſtrate this by example. Let there be John Stiles, and Francis, brothers by the ſame father and mother, and another ſon of the ſame mother by Lewis Gay a ſecond huſband. Now, if John dies ſeiſed of lands, but it is uncertain whether they deſcended to him from his father or mother; in this caſe his brother Francis, of the whole blood, is qualified to be his heir; for he is ſure to be in the line of deſcent from the firſt purchaſor, whether it were the line of the father or the mother. But if Francis ſhould die before John, without iſſue, the mother's ſon by Lewis Gay, (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his deſcent from the firſt purchaſor, who is unknown, nor has he that fair probability which the law admits as preſumptive evidence, ſince he is to the full as likely *not to be* deſcended from the line of the firſt purchaſor, as *to be* deſcended: and therefore the inheritance ſhall go to the neareſt relation poſſeſſed of this preſumptive proof, the whole blood.

AND, as this is the caſe *in feudis antiquis*, where there really did once exiſt a purchaſing anceſtor, who is forgotten; it is alſo the caſe *in feudis novis* held *ut antiquis*, where the purchaſing anceſtor is merely ideal, and never exiſted but only in fiction of law. Of this nature are all grants of lands in fee-ſimple at this day, which are inheritable as if they deſcended from ſome uncertain indefinite anceſtor, and therefore any of the collateral kindred of the real modern purchaſor (and not his own offſpring only) may inherit them, provided they be of the whole blood; for all ſuch are, in judgment of law, likely enough to be derived from this indefinite anceſtor; but thoſe of the half blood are excluded for want of the ſame probability. Nor ſhould this be thought hard, that a brother of the purchaſor, though only of the half blood, muſt thus be diſinherited, and a more remote relation of the whole blood admitted, merely upon a ſuppoſition and fiction of law; ſince it is

only upon a like ſuppoſition and fiction, that brethren of purchaſors (whether of the whole or half blood) are intitled to inherit at all; for we have ſeen that *in feudis ſtricte novis* neither brethren nor any other collaterals were admitted. As therefore *in feudis antiquis* we have ſeen the reaſonableneſs of excluding the half blood, if by a fiction of law a *feudum novum* be made deſcendible to collaterals as if it was *feudum antiquum*, it is juſt and equitable that it ſhould be ſubject to the ſame reſtrictions as well as the ſame latitude of deſcent.

PERHAPS by this time the excluſion of the half blood does not appear altogether ſo unreaſonable as at firſt ſight it is apt to do. It is certainly a very fine ſpun and ſubtile nicety: but, conſidering the principles upon which our law is founded, it is neither an injuſtice nor a hardſhip; ſince even the ſucceſſion of the whole blood was originally a beneficial indulgence rather than the ſtrict right of collaterals; and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could poſſibly have enjoyed before. The doctrine of whole blood was calculated to ſupply the frequent impoſſibility of proving a deſcent from the firſt purchaſor, without ſome proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpoſe it anſwers for the moſt part, effectually enough. I ſpeak with theſe reſtrictions, becauſe it does not, neither can any other method, anſwer this purpoſe entirely. For though all the anceſtors of John Stiles, above the common ſtock, are alſo the anceſtors of his collateral kinſman of the whole blood; yet, unleſs that common ſtock be in the firſt degree, (that is, unleſs they have the ſame father and mother) there will be intermediate anceſtors below the common ſtock, that may belong to either of them reſpectively, from which the other is not deſcended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other anceſtors, than what are in common to them both; yet with regard to his uncle, where the common ſtock is removed

one

one degree higher, (that is, the grandfather and grandmother) one half of John's anceſtors will not be the anceſtors of his uncle; his *patruus*, or father's brother, derives not his deſcent from John's maternal anceſtors; nor his *avunculus*, or mother's brother, from thoſe in the paternal line. Here then the ſupply of proof is deficient, and by no means amounts to a certainty: and, the higher the common ſtock is removed, the more will even the probability decreaſe. But it muſt be obſerved, that, upon the ſame principles of calculation) the half blood have always a much leſs chance to be deſcended from an unknown indefinite anceſtor of the deceaſed, than the whole blood in the ſame degree. As, in the firſt degree, the whole brother of John Stiles is ſure to be deſcended from that unknown anceſtor; his half brother has only an even chance, for half John's anceſtors are not his. So, in the ſecond degree, John's uncle of the whole blood has an even chance; but the chances are three to one againſt the uncle of the half blood, for three fourths of John's anceſtors are not his. In like manner, in the third degree, the chances are only three to one againſt John's great uncle of the whole blood, but they are ſeven to one againſt his great uncle of the half blood, for ſeven eighths of John's anceſtors have no connexion in blood with him. Therefore the much leſs probability of the half bloods deſcent from the firſt purchaſor, compared with that of the whole blood, in the ſeveral degrees, has occaſioned a general excluſion of the half blood in all.

BUT, while I thus illuſtrate the reaſon of excluding the half blood in general, I muſt be impartial enough to own, that, in ſome inſtances, the practice is carried farther than the principle upon which it goes will warrant. Particularly, when a man has two ſons by different venters, and the eſtate on his death deſcends from him to the eldeſt, who enters, and dies without iſſue; now the younger ſon cannot inherit this eſtate, becauſe he is not of the whole blood to the laſt proprietor. This, it muſt be owned, carries a hardſhip with it, even upon feodal principles: for the rule was introduced only to ſupply the proof of a deſcent from the firſt purchaſor; but here, as this eſtate notoriouſly

deſcended from the father, and as both the brothers confeſſedly ſprung from him, it is demonſtrable that the half brother muſt be of the blood of the firſt purchaſor, who was either the father or ſome of the father's anceſtors. When therefore there is actual demonſtration of the thing to be proved, it is hard to exclude a man by a rule ſubſtituted to ſupply that proof when deficient. So far as the inheritance can be evidently traced back, there ſeems no need of calling in this preſumptive proof, this rule of probability, to inveſtigate what is already certain. Had the elder brother indeed been a purchaſor, there would have been no hardſhip at all, for the reaſons already given: or had the *frater uterinus* only, or brother by the mother's ſide been excluded from an inheritance which deſcended from the father, it had been highly reaſonable.

INDEED it is this very inſtance, of excluding a *frater conſanguineus*, or brother by the father's ſide, from an inheritance which deſcended *a patre*, that Craig (z) has ſingled out, on which to ground his ſtrictures on the Engliſh law of half blood. And, really, it ſhould ſeem, as if the cuſtom of excluding the half blood in Normandy (a) extended only to exclude a *frater uterinus*, when the inheritance deſcended *a patre*, and *vice verſa*: as even with us it remained a doubt, in the time of Bracton (b), and of Fleta (c), whether the half blood on the father's ſide were excluded from the inheritance which originally deſcended from the common father, or only from ſuch as deſcended from the reſpective mothers, and from newly purchaſed lands. And the rule of law, as laid down by our Forteſcue (d), extends no farther than this; *frater fratri uterino non ſuccedet in haereditate paterna*. It is moreover worthy of obſervation, that by our law, as it now ſtands, the crown (which is the higheſt inheritance in the nation) may deſcend to the half blood of the preceding ſovereign (e), ſo as it be the blood of the firſt monarch, purchaſor, or (in the feodal language) conqueror, of the reigning family. Thus it actually did deſcend

(z) *l.* 2. *t.* 15. §. 14.
(a) *Gr. Couſtum. c.* 25.
(b) *l.* 2. *c.* 30. §. 3.
(c) *l.* 6. *c.* 1. §. 14.
(d) *de laud. LL. Angl.* 5.
(e) Plowd. 245. Co. Litt. 15.

from

from king Edward the ſixth to queen Mary, and from her to queen Elizabeth, who were reſpectively of the half blood to each other. For, the royal pedigree being always a matter of ſufficient notoriety, there is no occaſion to call in the aid of this preſumptive rule of evidence, to render probable the deſcent from the royal ſtock; which was formerly king William the Norman, and is now (by act of (f) parliament) the princeſs Sophia of Hanover. Hence alſo it is, that in eſtates-tail, where the pedigree from the firſt donee muſt be ſtrictly proved, half blood is no impediment to the deſcent (g): becauſe, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be deſirable to the legiſlature to give relief, by amending the law of deſcents in this ſingle inſtance, and ordaining that the half blood might inherit, where the eſtate notoriouſly deſcended from its own proper anceſtor, but not otherwiſe; or how far a private inconvenience ſhould be ſubmitted to, rather than a long eſtabliſhed rule ſhould be ſhaken; it is not for me to determine.

THE rule then, together with its illuſtration, amounts to this: that, in order to keep the eſtate of John Stiles as nearly as poſſible in the line of his purchaſing anceſtor, it muſt deſcend to the iſſue of the neareſt couple of anceſtors that have left deſcendants behind them: becauſe the deſcendants of the anceſtor only are not ſo likely to be in the line of that purchaſing anceſtor, as thoſe who are deſcended from two.

BUT here another difficulty ariſes. In the ſecond, third, fourth, and every ſuperior degree, every man has many couples of anceſtors, increaſing according to the diſtances in a geometrical progreſſion upwards (h), the deſcendant of all which reſpective couples are (repreſentatively) related to him in the ſame degree. Thus in the ſecond degree, the iſſue of George and Cecilia Stiles and of Andrew and Eſther Baker, the two grandſires and grandmothers, of John Stiles, are

(f) 12 Will. III. c. 2.
(g) Litt. §. 14, 15.
(h) See page 204.

each

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(f) 12 Will. III. c. 2.
(g) Litt. §. 14, 15.
(h) See page 204.

each

each in the ſame degree of propinquity; in the third degree, the reſpective iſſues of Walter and Chriſtian Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themſelves the next kindred of the whole blood to John Stiles. To which therefore of theſe anceſtors muſt we firſt reſort, in order to find out deſcendants to be preferably called to the inheritance? In anſwer to this, and to avoid the confuſion and uncertainty that muſt ariſe between the ſeveral ſtocks, wherein the purchaſing anceſtor may be ſought for,

VII. THE ſeventh and laſt rule or canon is, that in collateral inheritances the male ſtocks ſhall be preferred to the female; (that is, kindred derived from the blood of the male anceſtors ſhall be admitted before thoſe from the blood of the female)—unleſs where the lands have, in fact, deſcended from a female.

THUS the relations on the father's ſide are admitted *in infinitum*, before thoſe on the mother's ſide are admitted at all (i); and the relations of the father's father, before thoſe of the father's mother; and ſo on. And in this the Engliſh law is not ſingular, but warranted by the examples of the Hebrew and Athenian laws, as ſtated by Selden (k), and Petit (l); though among the Greeks, in the time of Heſiod (m), when a man died without wife or children, all his kindred (without any diſtinction) divided his eſtate among them. It is likewiſe warranted by the example of the Roman laws; wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the emperor Juſtinian (n) aboliſhed all diſtinction between them. It is alſo conformable to the cuſtomary law of Normandy (o), which indeed in moſt reſpects agrees with our law of inheritance.

(i) Litt. §. 4.
(k) *de ſucc. Ebraeor. c.* 12.
(l) *LL. Attic. l.* 1. *t.* 6.
(m) Θεογον. 606.
(n) *Nov.* 118.
(o) *Gr. Couſtum. c.* 25.

How-

HOWEVER, I am inclined to think, that this rule of our laws does not owe its immediate original to any view of conformity to thoſe which I have juſt now mentioned; but was eſtabliſhed in order to effectuate and carry into execution the fifth rule or canon before laid down; that every heir muſt be of the blood of the firſt purchaſor. For, when ſuch firſt purchaſor was not eaſily to be diſcovered after a long courſe of deſcents, the lawyers not only endeavoured to inveſtigate him by taking the next relation of the whole blood to the perſon laſt in poſſeſſion; but, alſo, conſidering that a preference had been given to males (by virtue of the ſecond canon) through the whole courſe of lineal deſcent from the firſt purchaſor to the preſent time, they judged it more likely that the lands ſhould have deſcended to the laſt tenant from his male than from his female anceſtors; from the father (for inſtance) rather than from the mother; from the father's father, rather than the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expreſſion) through the male line; and gave it to the next relations on the ſide of the father, the father's father, and ſo upwards; imagining with reaſon that this was the moſt probable way of continuing it in the line of the firſt purchaſor. A conduct much more rational than the preference of the *agnati* by the Roman laws: which, as they gave no advantage to the males in the firſt inſtance or direct lineal ſucceſſion, had no reaſon for preferring them in the tranſverſe collateral one: upon which account this preference was very wiſely aboliſhed by Juſtinian.

THAT this was the true foundation of the preference of the *agnati* or male ſtocks in our law, will farther appear if we conſider, that, whenever the lands have notoriouſly deſcended to a man from his mother's ſide, this rule is totally reverſed, and no relation of his by the father's ſide, as ſuch, can ever be admitted to them; becauſe he cannot poſſibly be of the blood of the firſt purchaſor. And ſo, *e converſo*, if the lands deſcended from the father's ſide, no relation of the mother, as ſuch, ſhall ever inherit. So alſo, if they

they in fact deſcended to John Stiles from his father's mother Cecilia Kempe; here not only the blood of Lucy Baker his mother, but alſo of George Stiles his father's father, is perpetually excluded. And, in like manner, if they be known to have deſcended from Frances Holland the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but alſo of Luke Kempe the father of Cecilia, is excluded. Whereas when the ſide from which they deſcended is forgotten, or never known, (as in the caſe of an eſtate newly purchaſed to be holden *ut feudum antiquum*) here the right of inheritance firſt runs up all the father's ſide, with a preference to the male ſtocks in every inſtance; and if it finds no heirs there, it then, and then only, reſorts to the mother's ſide; leaving no place untried, in order to find heirs that may by poſſibility be derived from the original purchaſor. The greateſt probability of finding ſuch was among thoſe deſcended from the male anceſtors: but, upon failure of iſſue there, they may poſſibly be found among thoſe derived from the females.

THIS I take to be the true reaſon of the conſtant preference of the agnatic ſucceſſion, or iſſue derived from the male anceſtors, through all the ſtages of collateral inheritance; as the ability for perſonal ſervice was the reaſon for preferring the males at firſt in the direct lineal ſucceſſion. We ſee clearly, that, if males had been perpetually admitted, in utter excluſion of females, the tracing the inheritance back through the male line of anceſtors muſt at laſt have inevitably brought us up to the firſt purchaſor, but, as males have not been *perpetually admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally poſtponed* to males; the tracing the inheritance up through the male ſtocks, will not give us abſolute demonſtration, but only a ſtrong probability, of arriving at the firſt purchaſor; which, joined with the other probability, of the wholeneſs or entirety of blood, will fall ſhort of a certainty.

BEFORE we conclude this branch of our enquiries, it may not be amiſs to exemplify theſe rules by a ſhort ſketch of the manner in which we muſt ſearch for the heir of a perſon, as *John Stiles*, who dies ſeiſed of the land which he acquired, and which therefore he held as a feud of indefinite antiquity (p).

IN the firſt place ſucceds the eldeſt ſon, Matthew Stiles, or his iſſue: (n° 1.)—if his line be extinct, then Gilbert Stiles, and the other ſons reſpectively, in order of birth, or their iſſue: (n° 2.)—in default of theſe, all the daughters together, Margaret and Charlotte Stiles, or their iſſue. n° 3. — On failure of the deſcendants of *John Stiles* himſelf, the iſſue of Geoffrey and Lucy Stiles, his parents, is called in: *viz.* firſt, Francis Stiles, the eldeſt brother of the whole blood, or his iſſue: (n° 4.) —then Oliver Stiles, and the other whole brothers, reſpectively, in order of birth, or their iſſue: (n° 5.) — then the ſiſters of the whole blood all together, Bridget and Alice Stiles, or their iſſue. (n° 6.) — In defect of theſe, the iſſue of George and Cecilia Stiles, his father's parents; reſpect being ſtill had to their age and ſex: (n° 7,) — then the iſſue of Walter and Chriſtian Stiles, the parents of his paternal grandfather: (n° 8.) — then the iſſue of Richard and Anne Stiles, the parents of his paternal grandfather's father: (n° 9.) — and ſo on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of theſe, the iſſue of William and Jane Smith, the parents of his paternal grandfather's mother: (n° 10.) — and ſo on in the paternal grandfather's maternal line, or blood of Chriſtian Smith, *in infinitum*; till both the immediate bloods of George Stiles, the paternal grandfather, are ſpent.—Then we muſt reſort to the iſſue of Luke and Frances Kempe, the parents of *John Stiles*'s paternal grandmother: (n° 11.)—then to the iſſue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (n° 12.) — and ſo on in the paternal grandmother's paternal line, or blood of Luke Kempe,

(p) See the table of deſcents annexed.

in

in infinitum — In default of which, we muſt call in the iſſue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (n° 13.)——and ſo on in the paternal grandmother's maternal line, or blood of Frances Holland *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are alſo ſpent.—Whereby the paternal blood of *John Stiles* entirely failing, recourſe muſt then, and not before, be had to his maternal relations; or the blood of the Bakers, (n° 14, 15, 16.) Willis's (n° 17.) Thorpes, (n° 18, 19.) and Whites; (n° 20.) in the ſame regular ſucceſſive order as in the paternal line.

THE ſtudent ſhould however be informed, that the claſs n° 10, would be poſtponed to n° 11, in conſequence of the doctrine laid down *arguendo*, by juſtice Manwoode, in the caſe of Clere and Brooke (q); from whence it is adopted by lord Bacon (r), and ſir Matthew Hale (s). And yet, notwithſtanding theſe reſpectable authorities, the compiler of this table hath ventured to give the preference therein to n° 10 before n° 11; for the following reaſons: 1. Becauſe this point was not the principal queſtion in the caſe of Clere and Brooke; but the law concerning it is delivered *obiter* only, and in the courſe of argument, by juſtice Manwoode; though afterwards ſaid to be confirmed by the three other juſtices in ſeparate extrajudicial conferences with the exporter. 2. Becauſe the chief-juſtice, ſir James Dyer, in reporting the reſolution of the court in what ſeems to be the ſame caſe (t), takes no notice of this doctrine. 3. Becauſe it appears from Plowden's report, that very many gentlemen of the law were diſſatisfied with this poſition of Juſtice Manwoode. 4. Becauſe the poſition itſelf deſtroys the otherwiſe entire and regular ſymmetry of our legal courſe of deſcents, as is manifeſt by inſpecting the table; and deſtroys alſo that conſtant preference of the male ſtocks in the law of inheritance, for which an additional reaſon is before given, beſides the mere dignity of

(q) Plowd. 450.
(r) Elem. c. 1,
(s) H. C. L. 240, 244.
(t) Dyer. 314,

blood.

blood. 5. Becauſe it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author (u); and eſtabliſhes a collateral doctrine, incompatible with the principal point reſolved in the caſe of Clere and Brooke, *viz.* the preference of n° 11. to n° 14. And, though that learned writer purpoſes to reſcind the principal point then reſolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet reſolved at all. 6. Becauſe by the reaſon that is given for this doctrine, in Plowden, Bacon, and Hale, *(viz.* that in any degree, paramount the firſt, the law reſpects proximity, and not dignity of blood) n° 18 ought alſo to be preferred to n° 16; which is directly contrary to the eighth rule laid down by Hale himſelf (w). 7. Becauſe this poſition ſeems to contradict the allowed doctrine of ſir Edward Coke (x); who lays it down (under different names) that the blood of the Kempes *(alias* Sandies) ſhall not inherit till the blood of the Stiles's *(alias* Fairfields) fail. Now the blood of the Stiles's does certainly not fail, till both n° 9 and n° 10 are extinct. Wherefore n° 11 (being the blood of the Kempes) ought not to inherit till then. 8 Becauſe in the caſe, Mich. 12 Edw. IV. 14. (y). (much relied on in that of Clere and Brooke) it is laid down as a rule, that "*ceſtuy, que doit inheriter al pere, doit inheriter al fits.*" And ſo ſir Matthew Hale (z) ſays, "that though the law "excludes the father from inheriting, yet it ſubſtitutes "and directs the deſcent, as it ſhould have been had the "father inherited." Now it is ſettled, by the reſolution in Clere and Brooke, that n° 10 ſhould have inherited to Geoffrey Stiles, the father, before n° 11; and therefore n° 10 ought alſo to be preferred in inheriting to *John Stiles*, the ſon.

IN caſe *John Stiles* was not himſelf the purchaſor, but the eſtate in fact came to him by deſcent from his father,

(u) Law of inheritances. 2d edit. pag. 30, 38, 61, 62, 66.
(w) Hiſt. C. L. 247.
(x) Co. Litt. 12 Hawk. abr. *in loc.*
(y) Fitzh. abr. tit. *diſcent.* 2 Bro. abr. t. *diſcent.* 3.
(z) Hiſt. C. L. 243.

mother,

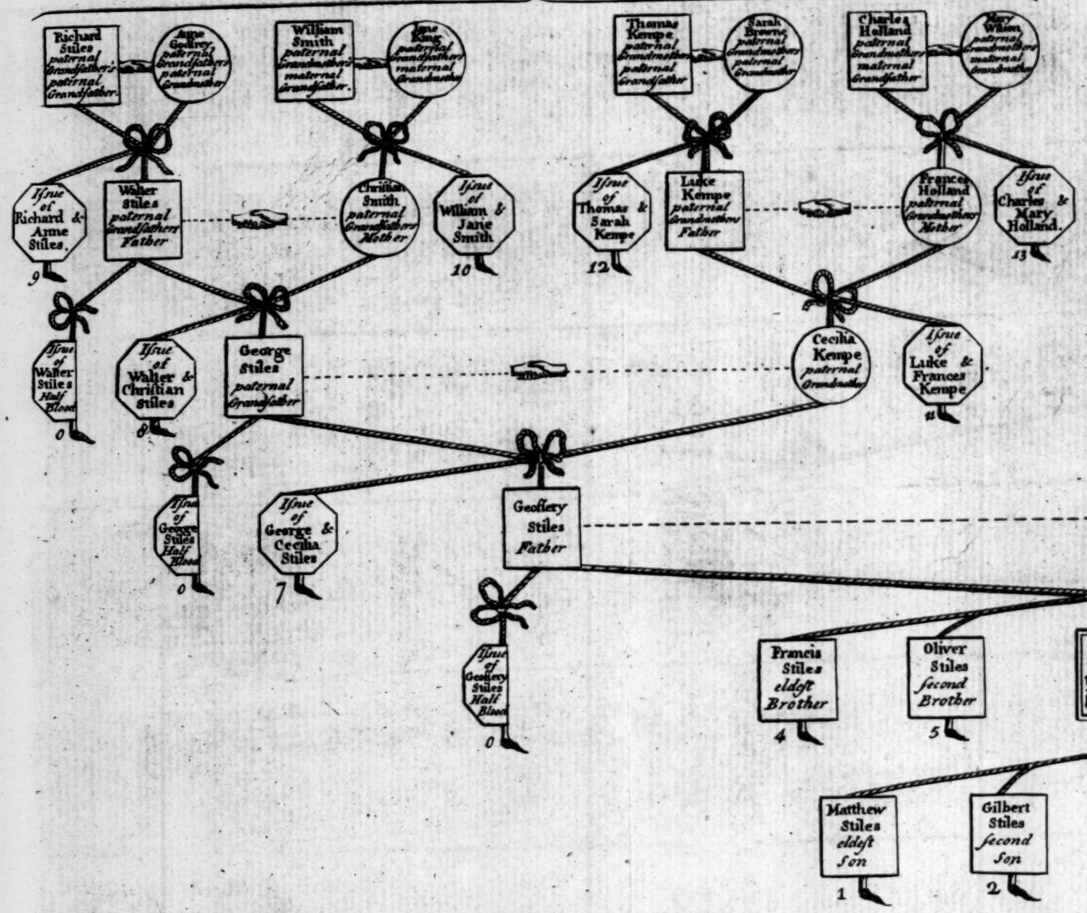
mother, or any higher anceſtor, there is this difference; that the blood of that line of anceſtors, from which it did not deſcend, can never inherit. Thus, if it deſcended from Geoffrey Stiles, the father, the blood of Lucy Baker, the mother, is perpetually excluded: and ſo, *vice verſa*, if it deſcended from Lucy Baker, it cannot deſcend to the blood of Geoffrey Stiles. This, in either caſe, cuts off one half of the table from any poſſible ſucceſſion. And farther, if it can be ſhewn to have deſcended from George Stiles, this cuts off three fourths; for now the blood not only of Lucy Baker, but alſo of Cecilia Kempe, is excluded. If, laſtly, it deſcended from Walter Stiles, this narrows the ſucceſſion ſtill more, and cuts off ſeven eights of the table; for now, neither the blood of Lucy Baker, nor of Cecilia Kempe, nor of Chriſtian Smith, can ever ſucceed to the inheritance. And the like rule will hold upon deſcents from any other anceſtors.

THE ſtudent ſhould bear in mind, that, during this whole proceſs, *John Stiles* is the perſon ſuppoſed to have been laſt actually ſeiſed of the eſtate. For if ever it comes to veſt in any other perſon, as heir to *John Stiles*, a new order of ſucceſſion muſt be obſerved upon the death of ſuch heir; ſince he, by his own ſeiſin, now becomes himſelf an anceſtor, or *ſtipes*, and muſt be put in the place of *John Stiles*. The figures therefore denote the order, in which the ſeveral claſſes would ſucceed to *John Stiles*, and not to each other: and, before we ſearch for an heir in any of the higher figures, (as n° 8.) we muſt be firſt aſſured that all the lower claſſes (from n° 1 to 7.) were extinct, at *John Stiles*'s deceaſe.

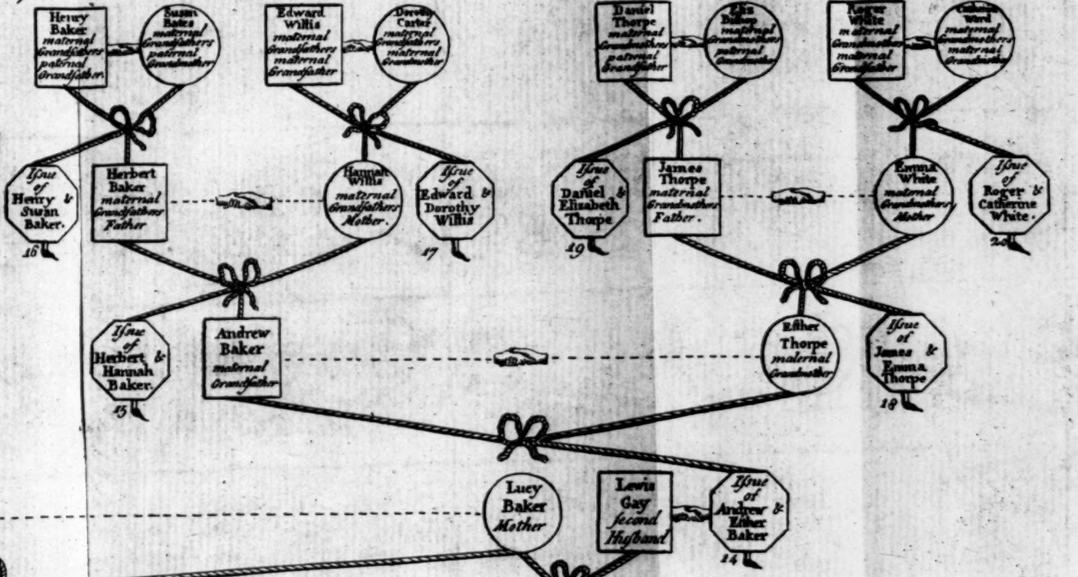
CHAPTER

Table of Descents

PATERNAL LINE



MATERNAL LINE



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CHAPTER THE FIFTEENTH.

OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

PURCHASE, *perquiſitio*, taken in its largeſt and moſt extenſive ſenſe, is thus defined by Littleton (a); the poſſeſſion of lands and tenements, which a man hath by his own act or agreement; and not by deſcent from any of his anceſtors or kindred In this ſenſe it is contradiſtinguiſhed from acquiſition by a right of blood, and includes every other method of coming to an eſtate, but merely that by inheritance; wherein the title is veſted in a perſon, not by his own act or agreement, but by the ſingle operation of law (b).

PURCHASE, indeed, in its vulgar and confined acceptation, is applied only to ſuch acquiſitions of land, as are obtained by way of bargain and ſale, for money, or ſome other valuable conſideration. But this falls far ſhort of the legal idea of purchaſe: for, if I *give* land freely to another, he is in the eye of the law a purchaſor (c); and falls within Littleton's definition, for he comes to the eſtate by his own agreement, that is, he conſents to the gift. A man who has his father's eſtate ſettled upon him in tail, before he is born, is alſo a purchaſor; for he takes quite another eſtate than the law of deſcents would have given him. Nay, even if the anceſtor deviſes his eſtate to his heir at law by will with other limitations, or in any other ſhape than the courſe of deſcent would direct, ſuch heir ſhall take by purchaſe (d). But if a man, ſeiſed in fee, deviſes his whole eſtate to his heir at law, ſo that the heir takes neither a greater nor a

(a) § 12.
(b) Co. Litt. 18.
(c) *Ibid.*
(d) Lord Raym. 728.

leſs eſtate by the deviſe than he would have done without it, he ſhall be adjudged to take by deſcent (e), even though it be charged with incumbrances (f); for the benefit of creditors, and others, who have demands on the eſtate of the anceſtor. If a remainder be limited to *the heirs* of Sempronius, here Sempronius himſelf takes nothing; but, if he die during the continuance of the particular eſtate, his heirs ſhall take as purchaſors (g). But, if an eſtate be made to A for life, remainder to his right heirs in fee, his heirs ſhall take by deſcent: for it is an antient rule of law, that where-ever the anceſtor takes an eſtate for life, the heir cannot by the ſame conveyance take an eſtate in fee by *purchaſe*, but only by *deſcent* (h). And, if A dies before entry, ſtill his heir ſhall take by deſcent, and not by purchaſe; for, where the heir takes any thing that might have veſted in the anceſtor, he takes by way of deſcent (i). The anceſtor, during his life, beareth in himſelf all his heirs (k); and therefore, when once he is, or might have been ſeiſed of the land, the inheritance ſo limited to his heirs veſts in the anceſtor himſelf: and the word "heirs" in this caſe is not eſteemed a word of *purchaſe*, but a word of *limitation*, enuring ſo as to encreaſe the eſtate of the anceſtor from a tenancy for life to a fee-ſimple. And, had it been otherwiſe, had the heir (who is uncertain till the death of the anceſtor) been allowed to take as a purchaſor originally nominated in the deed, as muſt have been the caſe if the remainder had been expreſsly limited to Matthew or Thomas by name; then, in the times of ſtrict feodal tenure, the lord would have been defrauded by ſuch a limitation of the fruits of his ſigniory, ariſing from a deſcent to the heir.

WHAT we call *purchaſe*, *perquiſitio*, the feudiſts call *conqueſt*, *conquæſtus*, or *conquiſitio* (l): both denoting any means of acquiring an eſtate out of the common courſe of inheritance. And this is ſtill the proper phraſe in the law of Scotland (m); as it was among the Norman juriſts, who

(e) 1 Roll. Abr. 626.
(f) Salk. 241. Lord Raym. 728.
(g) 1 Roll. Abr. 627.
(h) 1 Rep. 104 2 Lev. 60. Raym. 334.
(i) 1 Rep. 98.
(k) Co. Litt. 23.
(l) Crag. *l.* 1. *t.* 10. §. 18.
(m) Dalrymple of feuds, 210.

ſtiled

ſtiled the firſt purchaſor (that is, he who firſt brought the eſtate into the family which at preſent owns it) the conqueror or *conquereur* (n). Which ſeems to be all that was meant by the appellation which was given to William the Norman, when his manner of aſcending the throne of England was, in his own and his ſucceſſors' charters, and by the hiſtorians of the times, entitled *conquaeſtus*, and himſelf *conquaeſtor* or *conquiſitor* (o); ſignifying, that he was the firſt of his family who acquired the crown of England, and from whom therefore all future claims by deſcent muſt be derived: though now, from our diſuſe of the feodal ſenſe of the word, together with the reflexion of his forcible method of acquiſition, we are apt to annex the idea of *victory* to this name of *conqueſt* or *conquiſition*; a title which, however juſt with regard to the *crown*, the conqueror never pretended with regard to the *realm* of England; nor, in fact, ever had (p).

THE difference in effect, between the acquiſition of an eſtate by deſcent and by purchaſe, conſiſts principally in theſe two points: 1. That by purchaſe the eſtate acquires a new inheritable quality, and is deſcendible to the owner's blood in general, and not the blood only of ſome particular anceſtor. For, when a man takes an eſtate by purchaſe, he takes it not *ut feudum paternum* or *maternum*, which would deſcend only to the heirs by the father's or the mother's ſide: but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs general, firſt of the paternal, and then of the maternal line (q). 2. An eſtate taken by purchaſe will not make the heir anſwerable for the acts of the anceſtor, as an eſtate by deſcent will. For, if the anceſtor, by any deed, obligation, covenant, or the like, bindeth himſelf and his heirs, and dieth; this deed, obligation, or covenant, ſhall be binding upon the heir, ſo far forth only as he had any eſtate of inheritance veſted in him (or in ſome other in truſt for him) (r) by de-

(n) *Gr. Couſtum. Gloſſ. c.* 25. p. 40.
(o) Spelm. *Gloſſ.* 145.
(p) See Book I. ch. 3.
(q) See page 236.
(r) Stat. 29 Car. II. c. 3.

ſcent from that anceſtor, ſufficient to anſwer the charge (s); whether he remains in poſſeſſion, or hath aliened it before action brought (t): which ſufficient eſtate is in law called *aſſets*; from the French word, *aſſez*, enough (u). Therefore if a man covenants, for himſelf and his heirs, to keep my houſe in repair, I can then (and then only) compel his heir to perform this covenant, when he has an eſtate ſufficient for this purpoſe, or *aſſets*, by deſcent from the covenantor: for though the covenant deſcends to the heir, whether he inherits any eſtate or no, it lies dormant, and is not compulſory, until he has aſſets by deſcent (v)

THIS is the legal ſignification of the word *perquiſitio*, or purchaſe; and in this ſenſe it includes the five following methods of acquiring a title to eſtates: 1. Eſcheat. 2. Occupancy. 3. Preſcription. 4. Forfeiture. 5. Alienation. Of all theſe in their order.

I. ESCHEAT, we may remember (w), was one of the fruits and conſequences of feodal tenure. The word itſelf is originally French or Norman (x), in which language it ſignifies chance or accident; and with us denotes an obſtruction of the courſe of deſcent, and a conſequent determination of the tenure, by ſome unforeſeen contingency: in which caſe the land naturally reſults back, by a kind of reverſion, to the original grantor or lord of the fee (y).

ESCHEAT therefore being a title frequently veſted in the lord by inheritance, as being the fruit of a ſigniory to which he was intitled by deſcent, (for which reaſon the lands eſcheating ſhall attend the ſigniory, and be inheritable by ſuch only of his heirs as are capable of inheriting the other (z), it may ſeem in ſuch caſes to fall more properly under the former general head of acquiring title to eſtates, *viz.* by deſcent, (being veſted in him by act of

(s) 1 P. Wms. 777.
(t) Stat. 3 & 4 W. & M. c. 14.
(u) Finch law. 119.
(v) Finch. Rep. 86.
(w) See pag. 72.
(x) *Eſchet* or *échet*, formed from the verb *eſchoir* or *échoir*, to happen.
(y) 1 *Feud.* 86. Co. Litt. 13.
(z) Co. Litt. 13.

law,

law, and not by his own act or agreement) than under the preſent, by purchaſe. But it muſt be remembered that in order to complete this title by eſcheat, it is neceſſary that the lord perform an act of his own, by *entering* on the lands and tenements ſo eſcheated, or ſuing out a *writ of eſcheat* (a): on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a ſtranger who uſurps the poſſeſſion, his title by eſcheat is barred (b). It is therefore in ſome reſpect a title acquired by his own act, as well as by act of law. Indeed this may alſo be ſaid of deſcents themſelves, in which an entry or other ſeiſin is required, in order to make a complete title; and therefore this diſtribution by our legal writers ſeems in this reſpect rather inaccurate: for, as eſcheats muſt follow the nature of the ſigniory to which they belong, they may veſt by either purchaſe or deſcent, according as the ſigniory is veſted. And, though ſir Edward Coke conſiders the lord by eſcheat as in ſome reſpects the aſſignee of the laſt tenant (c), and therefore taking by purchaſe; yet, on the other hand, the lord is more frequently conſidered as being *ultimus haeres*, and therefore taking by deſcent in a kind of caducary ſucceſſion.

THE law of eſcheats, is founded upon this ſingle principle, that the blood of the perſon laſt ſeized in fee ſimple is, by ſome means or other, utterly extinct and gone: and, ſince none can inherit his eſtate but ſuch as are of his blood and conſanguinity, it follows as a regular conſequence, that when ſuch blood is extinct, the inheritance itſelf muſt fail; the land muſt become what the feodal writers denominate *feudum apertum*; and muſt reſult back again to the land of the fee, by whom, or by thoſe whoſe eſtate he hath, it was given.

ESCHEATS are frequently divided into thoſe *propter defectum ſanguinis*, and thoſe *propter delictum tenentis:* the one ſort, if the tenant dies without heirs: the other, if his blood be attainted (d). But both theſe ſpecies may well be

(a) Bro. *Abr. tit. eſcheat.* 26.
(b) *Ibid. tit. acceptance.* 25. Co. Litt. 268.
(c) 1 Inſt. 215.
(d) Co. Litt. 13. 92.

comprehended under the firſt denomination only; for he that is attainted ſuffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one inſtance, and expires in the other; or, as the doctrine of eſcheats is very fully expreſſed in Fleta (e), "*dominus capitalis feodi loco haeredis habetur, quoties per defectum vel delictum extinguitur ſanguis tenentis.*"

ESCHEATS therefore ariſing merely upon the deficiency of the blood, whereby the deſcent is impeded, their doctrine will be better illuſtrated by conſidering the ſeveral caſes wherein hereditary blood may be deficient, than by any other method whatſoever.

1, 2, 3. The firſt three caſes, wherein inheritable blood is wanting, may be collected from the rules of deſcent laid down and explained in the preceding chapter, and therefore will need very little illuſtration or comment. Firſt, when the tenant dies without any relations on the part of any of his anceſtors: ſecondly, when he dies without any relations on the part of thoſe anceſtors from whom his eſtate deſcended: thirdly, when he dies without any relations of the whole blood. In two of theſe caſes the blood of the firſt purchaſor is certainly, in the other it is probably, at an end; and therefore in all of them the law directs, that the land ſhall eſcheat to the lord of the fee: for the lord would be manifeſtly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any perſon ſhould be ſuffered to ſucceed to lands, who is not of the blood of the firſt feudatory, to whom for his perſonal merit the eſtate is ſuppoſed to have been granted.

4. A MONSTER, which hath not the ſhape of mankind, but in any part evidently bears the reſemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, yet if it

(e) *l.* 6. *c.* 1.

hath

hath human ſhape, it may be heir (f). This is a very antient rule in the law of England (g); and its reaſon is too obvious, and too ſhocking, to bear a minute diſcuſſion. The Roman law agrees with our own in excluding ſuch births from ſucceſſions (h): yet accounts them, however, children in ſome reſpects, where the parents, or at leaſt the father, could reap any advantage thereby (i); (as the *jus trium liberorum*, and the like) eſteeming them the misfortune, rather than the fault of that parent. But our law will not admit a birth of this kind to be ſuch an iſſue, as ſhall intitle the huſband to be tenant by the courteſy (k); becauſe it is not capable of inheriting. And therefore, if there appears no other heir than ſuch a prodigious birth, the land ſhall eſcheat to the lord.

5. BASTARDS are incapable of being heirs. Baſtards, by our law, are ſuch children as are not born either in lawful wedlock, or within a competent time after its determination (l). Such are held to be *nullius filii*, the ſons of nobody; for the maxim of the law is, *qui ex damnato coitu naſcuntur, inter liberos non computantur* (m). Being thus the ſons of nobody, they have no blood in them, at leaſt no inheritable blood; conſequently none of the blood of the firſt purchaſor: and therefore, if there be no other claimant than ſuch illegitimate children, the land ſhall eſcheat to the lord (n). The civil law differs from ours in this point, and allows a baſtard to ſucceed to an inheritance, if after its birth the mother was married to the father (o): and alſo, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet ſhe and her baſtard ſon were admitted each to one twelfth of the inheritance (p). and a baſtard was likewiſe capable of ſuc-

(f) Co. Litt. 7. 8.

(g) *Qui contra formam humani generis converſo more procreantur, ut ſi mulier monſtroſum vel prodigioſum enixa ſit, inter liberos non computantur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut ſi ſex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari: et, ſi membra ſint inutilia aut tortuoſa, non tamen eſt partus monſtroſus.* Bracton, *l.* 1. *c.* 6. & *l.* 5. *tr.* 5. *c.* 30.

(h) *Ff.* 1. 5. 14.

(i) *Ff.* 50. 16. 135. Paul. 4. *ſent.* 9. §. 63.

(k) Co. Litt. 29.

(l) See Book I. ch. 16.

(m) Co. Litt. 8.

(n) Finch. Law. 117.

(o) *Nov.* 89. *c.* 8.

(p) *Ibid. c.* 12.

ceeding to the whole of his mother's eſtate, although ſhe was never married; the mother being ſufficiently certain, though the father is not (q). But our law, in favour of marriage, is much leſs indu'gent to baſtards.

THERE is indeed one inſtance, in which our law has ſhewn them ſome little regard, and that is uſually termed the caſe of *baſtard eignè* and *mulier puiſnè*. This happens when a man has a baſtard ſon, and afterwards marries the mother, and by her has a legitimate ſon, who in the language of the law is called a *mulier*, or as Glanvil (r) expreſſes it in his Latin, *filius mulieratus*; the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldeſt ſon is baſtard, or *baſtard eiſnè*; and the younger ſon is legitimate, or *mulier puiſnè*. If then the father dies, and the *baſtard eignè* enters upon his land, and enjoys it to his death, and dies ſeized thereof, whereby the inheritance deſcends to his iſſue; in this caſe the *mulier puiſnè*, and all other heirs, (though minors, feme-coverts, or under any incapacity whatſoever) are totally barred of their right (s). And this, 1. as a puniſhment on the *mulier* for his negligence, in not entering during the *baſtard*'s life, and evicting him. 2. Becauſe the law will not ſuffer a man to be baſtardized after his death, who entered as heir and died ſeiſed, and ſo paſſed for legitimate in his life time. 3. Becauſe the canon law (following the civil) did allow ſuch *baſtard eignè* to be legitimate, on the ſubſequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritance of this kingdom, yet) paid ſuch a regard to a perſon thus peculiarly circumſtanced, that, after the land had deſcended to his iſſue, they would not unravel the matter again, and ſuffer his eſtate to be ſhaken. But this indulgence was ſhewn to no other kind of baſtard; for, if the mother never was married to the father, ſuch baſtard could have no colourable title at all (t).

(q) *Cod.* 6. 57. 5.
(r) *l.* 7. *c.* 1.
(s) Litt. §. 399. Co. Litt. 244.
(t) Litt. §. 400.

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As baſtards cannot be heirs themſelves, ſo neither can they have any heirs but thoſe of their own bodies. For, as all collateral kindred conſiſts in being derived from the ſame common anceſtor, and as a baſtard has no legal anceſtors, he can have no collateral kindred; and, conſequently, can have no legal heirs, but ſuch as claim by a lineal deſcent from himſelf. And therefore, if a baſtard purchaſes land, and dies ſeized thereof without iſſue, and inteſtate, the land ſhall eſcheat to the lord of the fee (u).

6. ALIENS alſo are incapable of taking by deſcent, or inheriting (w): for they are not allowed to have any inheritable blood in them; rather indeed upon a principle of national or civil policy, than upon reaſons ſtrictly feodal. Though, if lands had been ſuffered to fall into their hands who owe no allegiance to the crown of England, the deſign of introducing our feuds, the defence of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his land ſhall eſcheat to the lord.

As aliens cannot inherit, ſo far they are on a level with baſtards; but, as they are alſo diſabled to hold by purchaſe (x), they are under ſtill greater diſabilities. And, as they can neither hold by purchaſe, nor by inheritance, it is almoſt ſuperfluous to ſay that they can have no heirs, ſince they can have nothing for an heir to inherit: but ſo it is expreſsly holden (y), becauſe they have not in them any inheritable blood.

AND farther, if an alien be made a denizen by the king's letters patent, and then purchaſe lands, (which the law allows ſuch a one to do) his ſon, born before his denization, ſhall not (by the common law) inherit thoſe lands; but a ſon born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldeſt ſon; but by

(u) Bract. *l.* 2. *c.* 7. Co. Litt. 244.
(w) Co. Litt. 8.
(x) *Ibid.* 2.
(y) *Ibid.* 1 Lev. 59.

deniza-

denization it acquires an hereditary quality, which will be tranſmitted to his ſubſequent poſterity. Yet, if he had been naturalized by act of parliament, ſuch eldeſt ſon might then have inherited; for that cancels all defects, and is allowed to have a retroſpective energy, which ſimple denization has not (z).

SIR Edward Coke (a) alſo holds, that if an alien cometh into England, and there hath iſſue two ſons, who are thereby natural born ſubjects; and one of them purchaſes land, and dies; yet neither of theſe brethren can be heir to the other. For the *commune vinculum*, or common ſtock of their conſanguinity, is the father; and, as he had no inheritable blood in him, he could communicate none to his ſons; and, when the ſons can by no poſſibility be heirs to the father, the one of them ſhall not be heir to the other. And this opinion of his ſeems founded upon ſolid principles of the antient law; not only from the rule before cited (b), that *ceſtuy, que doit inheriter al pere, doit inheriter al fits*; but alſo becauſe we have ſeen that the only feodal foundation upon which newly purchaſed land can poſſibly deſcend to a brother, is the ſuppoſition and fiction of law; that it deſcended from ſome one of his anceſtors: but in this caſe as the immediate anceſtor was an alien, from whom it could by no poſſibility deſcend, this ſhould deſtroy the ſuppoſition, and impede the deſcent, and the land ſhould be inherited *ut feudum ſtricte novum*; that is, by none but the lineal deſcendants of the purchaſing brother; and, on failure of them, ſhould eſcheat to the lord of the fee. But this opinion hath been ſince over-ruled (c): and it is now held for law, that the ſons of an alien, born here, may inherit to each other. And reaſonably enough upon the whole: for, as (in common purchaſes) the whole of the ſuppoſed deſcent from indefinite anceſtors is but fictitious, the law may as well ſuppoſe the requiſite anceſtor as ſuppoſe the requiſite deſcent.

(z) Co. Litt. 129.
(a) 1 Inſt. 8.
(b) See Page 223 and 239.
(c) 1 Ventr. 473. 1 Lev. 59. 1 Sid. 193.

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IT is alſo enacted, by the ſtatute 11 & 12 W. III. c. 6. that all perſons, being natural-born ſubjects of the king, may inherit and make their titles by deſcent from any of their anceſtors lineal or collateral; although their father, or mother, or other anceſtor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in caſe perſons ſhould thereby gain a future capacity to inherit, who did not exiſt at the death of the perſon laſt ſeized. As, if Francis the elder brother of John Stiles be an alien, and Oliver the younger be a natural-born ſubject, upon John's death without iſſue his lands will deſcend to Oliver the younger brother: now, if afterwards Francis hath a child, it was feared, that under the ſtatute of king William, this new-born child might defeat the eſtate of his uncle Oliver. Wherefore it is provided, by the ſtatute 25 Geo. II. c. 39. that no right of inheritance ſhall accrue by virtue of the former ſtatute to any perſons whatſoever, unleſs they are in being and capable to take as heirs at the death of the perſon laſt ſeiſed:—with an exception however to the caſe, where lands ſhall deſcend to the daughter of an alien; which daughter ſhall reſign ſuch inheritance to her firſt-born brother, or divide it with her after-born ſiſters, according to the uſual rule (d) of deſcents by the common law.

7. BY attainder alſo, for treaſon or other felony, the blood of the perſon attainted is ſo corrupted, as to be rendered no longer inheritable.

GREAT care muſt be taken to diſtinguiſh between forfeiture of lands to the king, and this ſpecies of eſcheat to the lord; which, by reaſon of their ſimilitude in ſome circumſtances, and becauſe the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever elſe the offender poſſeſſed, was the doctrine of the old Saxon law (e), as a part of puniſhment for the

(d) See pag. 208 and 214.

(e) *LL. Aelfred.* c. 4. *LL. Canut.* c. 54.

offence;

offence; and does not at all relate to the feodal ſyſtem, nor is the conſequence of any ſigniory or lordſhip paramount (f): but, being a prerogative veſted in the crown, was neither ſuperſeded nor diminiſhed by the introduction of the Norman tenures; a fruit and conſequence of which eſcheat muſt undoubtedly be reckoned. Eſcheat therefore operates in ſubordination to this more antient and ſuperior law of forfeiture.

THE doctrine of eſcheat upon attainder, taken ſingly, is this: that the blood of the tenant, by the commiſſion of any felony, (under which denomination all treaſons were formerly (g) compriſed) is corrupted and ſtained, and the original donation of the feud is thereby determined, it being always granted to the vaſal on the implied condition of *dum bene ſe geſſerit*. Upon the thorough demonſtration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the eſtate inſtantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguiſhed and blotted out for ever. In this ſituation the law of feodal eſcheat was brought into England at the conqueſt; and in general ſuperadded to the antient law of forfeiture. In conſequence of which corruption and extinction of hereditary blood, the land of all felons would immediately inveſt in the lord, but that the ſuperior law of forfeiture intervenes, and intercepts it in its paſſage; in caſe of treaſon, for ever; in caſe of other felony, for only a year and a day, after which time it goes to the lord in a regular courſe of eſcheat (h), as it would have done to the heir of the felon in caſe the feodal tenures had never been introduced. And that this is the true operation and genuine hiſtory of eſcheats will moſt evidently appear from this incident to gavelkind lands, (which ſeem to be the old Saxon tenure) that they are in no caſe ſubject to eſcheat for felony, though they are liable to forfeiture for treaſon (i).

(f) 2 Inſt. 64. Salk. 85.
(g) 3 Inſt. 15. Stat. 25. Edw. III. c. 2. §. 12.
(h) 2 Inſt. 36.
(i) Somner. 53. Wright. Ten. 118.

As

As a conſequence of this doctrine of eſcheat, all lands of inheritance immediately reveſting in the lord, the wife of the felon was liable to loſe her dower, till the ſtatute 1 Edw. VI. c. 12. enacted, that albeit any perſon be attainted of miſpriſion of treaſon, murder, or felony, yet his wife ſhall enjoy her dower. But ſhe has not this indulgence where the antient law of forfeiture operates, for it is expreſsly provided by the ſtatute 5 & 6 Edw. VI. c. 11. that the wife of one attaint of high treaſon ſhall not be endowed at all.

HITHERTO we have only ſpoken of eſtates veſted in the offender, at the time of his offence, or attainder. And here the law of fofeiture ſtops; but the law of eſcheat purſues the matter ſtill farther. For, the blood of the tenant being utterly corrupted and extinguiſhed, it follows, not only that all he now has ſhould eſcheat from him, but alſo that he ſhould be incapable of inheriting any thing for the future. This may farther illuſtrate the diſtinction between forfeiture and eſcheat. If therefore a father be ſeized in fee, and the ſon commits treaſon and is attainted, and then the father dies: here the land ſhall eſcheat to the lord; becauſe the ſon, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life: but nothing ſhall be forfeited to the king, for the ſon never had any intereſt in the lands to forfeit (k). In this caſe the eſcheat operates, and not the forfeiture; but in the following inſtance the forfeiture works, and not the eſcheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the caſe) that it ſhall not extend to corruption of blood: here the lands of the felon ſhall not eſcheat to the lord, but yet the profits of them ſhall be forfeited to the king ſo long as the offender lives (l).

THERE is yet a farther conſequence of the corruption and extinction of hereditary blood, which is this: that the

(k) Co. Litt. 13. (l) 3 Inſt. 47.

perſon

perſon attainted ſhall not only be incapable himſelf of inheriting, or tranſmitting his own property by heirſhip, but ſhall alſo obſtruct the deſcent of lands or tenements to his poſterity, in all caſes where they are obliged to derive their title through him from any remoter anceſtor. The channel, which conveyed the hereditary blood from his anceſtors to him, is not only exhauſted for the preſent, but totally dammed up and rendered impervious for the future. This is a refinement upon the antient law of feuds, which allowed that the grandſon might be heir to his grandfather, though the ſon in the intermediate generation was guilty of felony (m). But, by the law of England, a man's blood is ſo univerſally corrupted by attainder, that his ſons can neither inherit to him nor to any other anceſtor (n), at leaſt on the part of their attainted father.

THIS corruption of blood cannot be abſolutely removed but by authority of parliament. The king may excuſe the public puniſhment of an offender; but cannot aboliſh the private right, which has accrued or may accrue to individuals as a conſequence of the criminal's attainder. He may remit a forfeiture, in which the intereſt of the crown is alone concerned: but he cannot wipe away the corruption of blood; for therein a third perſon hath an intereſt, the lord who claims by eſcheat. If therefore a man hath a ſon, and is attainted, and afterwards pardoned by the king; this ſon can never inherit to his father, or father's anceſtors: becauſe his paternal blood, being once thoroughly corrupted by his father's attainder, muſt continue ſo: but if the ſon had been born after the pardon, he might inherit; becauſe by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children (o).

HEREIN there is however a difference between aliens and perſons attainted. Of aliens, who could never by any poſſibility be heirs, the law takes no notice: and therefore we have

(m) Van Leeuwen *in* 2 *Feud.* 31.
(n) Co. Litt. 391.
(o) *Ibid.* 392.

ſeen,

ſeen, that an alien elder brother ſhall not impede the deſcent to a natural-born younger brother. But in attainders it is otherwiſe: for if a man hath iſſue a ſon, and is attainted, and is afterwards pardoned, and then hath iſſue a ſecond ſon, and dies; here the corruption of blood is not removed from the eldeſt, and therefore he cannot be heir: neither can the youngeſt be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a poſſibility of being heir; and therefore the younger brother ſhall not inherit, but the land ſhall eſcheat to the lord: though, had the elder died without iſſue in the life of the father, the younger ſon born after the pardon might well have inherited, for he hath no corruption of blood (p). So if a man hath iſſue two ſons, and the elder in the life time of the father hath iſſue, and then is attainted and executed, and afterwards the father dies, the lands of the father ſhall not deſcend to the younger ſon: for the iſſue of the elder, which had once a poſſibility to inherit, ſhall impede the deſcent to the younger, and the land ſhall eſcheat to the lord (q). Sir Edward Coke in this caſe allows (r), that if the anceſtor be attainted, his ſons born before the attainder may be heirs to each other; and diſtinguiſhes it from the caſe of the ſons of an alien, becauſe in this caſe the blood was inheritable when imparted to them from the father: but he makes a doubt (upon the ſame principles, which are now over-ruled) (s) whether ſons, born after the attainder, can inherit to each other; for they never had any inheritable blood in them.

UPON the whole it appears, that a perſon attainted is neither allowed to retain his former eſtate, nor to inherit any future one, nor to tranſmit any inheritance to his iſſue, either immediately from himſelf, or mediately through himſelf from any remoter anceſtor; for his inheritable blood, which is neceſſary either to hold, to take, or to tranſmit any feodal property, is blotted out, corrupted, and extinguiſhed for ever: the conſequence of which is, that eſtates, thus impeded in their deſcent, reſult back and eſcheat to the lord.

(p) Co. Litt. 8.
(q) Dyer. 48.
(r) Co. Litt. 8.
(s) 1 Hal. P. C. 357.

THIS

THIS corruption of blood, thus ariſing from feodal principles, but perhaps extended farther than even thoſe principles will warrant, has been long looked upon as a peculiar hardſhip: becauſe, the oppreſſive parts of the feodal tenures being now in general aboliſhed, it ſeems unreaſonable to reſerve one of their moſt inequitable conſequences; namely, that the children ſhould not only be reduced to preſent poverty, (which, however ſevere, is ſufficiently juſtified upon reaſons of public policy) but alſo be laid under future difficulties of inheritance, on account of the guilt of their anceſtors. And therefore in moſt (if not all) of the new felonies, created by parliament ſince the reign of Henry the eighth, it is declared that they ſhall not extend to any corruption of blood: and by the ſtatute 7 Ann. c. 21. (the operation of which is poſtponed by the ſtatute 17 Geo. II. c. 39.) it is enacted, that after the death of the pretender, and his ſons, no attainder for treaſon ſhall extend to the diſinheriting any heir, nor to the prejudice of any perſon, other than the offender himſelf: which proviſions have indeed carried the remedy farther than was required by the hardſhips above complained of; which is only the future obſtruction of deſcents, where the pedigree happens to be deduced through the blood of an attainted anceſtor.

BEFORE I conclude this head, of eſcheat, I muſt mention one ſingular inſtance in which lands held in fee-ſimple are not liable to eſcheat to the lord, even when their owner it no more, and hath left no heirs to inherit them. And this is the caſe of a corporation: for if that comes by any accident to be diſſolved, the donor or his heirs ſhall have the land again in reverſion, and not the lord by eſcheat: which is perhaps the only inſtance where a reverſion can be expectant on a grant in fee-ſimple abſolute. But the law, we are told (t), doth tacitly annex a condition to every ſuch gift or grant, that if the corporation be diſſolved, the donor or grantor ſhall re-enter; for the cauſe of the gift or grant

(t) Co. Litt. 13.

faileth.

faileth. This is indeed founded upon the ſelf-ſame principle as the law of eſcheat; the heirs of the donor being only ſubſtituted inſtead of the chief lord of the fee: which was formerly very frequently the caſe in ſubinfeudations, or alienations of lands by a vaſal to be holden as of himſelf; till that practice was reſtrained by the ſtatute of *quia emptores*, 18 Edw. I. ſt. 1. to which this very ſingular inſtance ſtill in ſome degree remains an exception.

THERE is one more incapacity of taking by deſcent, which, not being productive of any eſcheat, is not properly reducible to this head, and yet muſt not be paſſed over in ſilence. It is enacted by the ſtatute 11 & 12 Will. III. c. 4. that every papiſt who ſhall not abjure the errors of his religion by taking the oaths to the government, and making the declaration againſt tranſubſtantiation, within ſix months after he has attained the age of eighteen years, ſhall be incapable of inheriting, or taking, by deſcent as well as purchaſe, any real eſtates whatſoever; and his next of kin, being a proteſtant, ſhall hold them to his own uſe till ſuch time as he complies with the terms impoſed by the act. This incapacity is merely perſonal; it affects himſelf only, and does not deſtroy the inheritable quality of his blood, ſo as to impede the deſcent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion, and became a monk profeſſed, was incapable of inheriting lands, both in our own (u) and the feodal law; *eo quod deſiit eſſe miles ſeculi, qui factus eſt miles Chriſti; nec beneficium pertinet ad eum qui non debet gerere officium* (w). But yet he was accounted only *civiliter mortuus*; he did not impede the deſcent to others, but the next heir was intitled to his or his anceſtor's eſtate.

THESE are the ſeveral deficiencies of hereditary blood, recognized by the law of England; which, ſo often as they happen, occaſion lands to eſcheat to the original proprietary or lord.

(u) Co. Litt. 132.
(w) 2 *Feud*, 21.

THIS corruption of blood, thus ariſing from feodal principles, but perhaps extended farther than even thoſe principles will warrant, has been long looked upon as a peculiar hardſhip: becauſe, the oppreſſive parts of the feodal tenures being now in general aboliſhed, it ſeems unreaſonable to reſerve one of their moſt inequitable conſequences; namely, that the children ſhould not only be reduced to preſent poverty, (which, however ſevere, is ſufficiently juſtified upon reaſons of public policy) but alſo be laid under future difficulties of inheritance, on account of the guilt of their anceſtors. And therefore in moſt (if not all) of the new felonies, created by parliament ſince the reign of Henry the eighth, it is declared that they ſhall not extend to any corruption of blood: and by the ſtatute 7 Ann. c. 21. (the operation of which is poſtponed by the ſtatute 17 Geo. II. c. 39.) it is enacted, that after the death of the pretender, and his ſons, no attainder for treaſon ſhall extend to the diſinheriting any heir, nor to the prejudice of any perſon, other than the offender himſelf: which proviſions have indeed carried the remedy farther than was required by the hardſhips above complained of; which is only the future obſtruction of deſcents, where the pedigree happens to be deduced through the blood of an attainted anceſtor.

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(u) Co. Litt. 132. (w) 2 *Feud*, 21.

CHAPTER THE SIXTEENTH.

OF TITLE BY OCCUPANCY.

OCCUPANCY is the taking poſſeſſion of thoſe things, which before belonged to nobody. This, as we have ſeen (a) is the true ground and foundation of all property, or of holding thoſe things in ſeveralty, which by the law of nature, unqualified by that of ſociety, were common to all mankind. But, when once it was agreed that every thing capable of ownerſhip ſhould have an owner, natural reaſon ſuggeſted, that he who could firſt declare his intention of appropriating any thing to his own uſe, and, in conſequence of ſuch his intention, actually took it into poſſeſſion, ſhould thereby gain the abſolute property of it; according to that rule of the law of nations, recognized by the laws of Rome (b), *quod nullius eſt, id ratione naturali occupanti conceditur.*

THIS right of occupancy, ſo far as it concerns real property, (for of perſonal chattels I am not in this place to ſpeak) hath been confined by the laws of England within a very narrow compaſs; and was extended only to a ſingle inſtance: namely, where a man was tenant *pur auter vie*, or had an eſtate granted to himſelf only (without mentioning his heirs) for the life of another man, and died during the life of *ceſtuy que vie*, or him by whoſe life it was holden: in this caſe he, that could firſt enter on the land, might lawfully retain the poſſeſſion ſo long as *ceſtuy que vie* lived, by right of occupancy (c).

(a) See pag. 3. & 8. (b) *Ff.* 41. 1. 3. (c) Co. Litt. 41.

THIS

THIS ſeems to have been recurring to firſt principles, and calling in the law of nature to aſcertain the property of the land, when left without a legal owner. For it did not revert to the grantor; who had parted with all his intereſt, ſo long as *ceſtuy que vie* lived: it did not eſcheat to the lord of the fee; for all eſcheats muſt be of the abſolute entire fee, and not of any particular eſtate carved out of it; much leſs of ſo minute a remnant as this: it did not belong to the grantee; for he was dead: it did not deſcend to his heirs; for there were no words of inheritance in the grant: nor could it veſt in his executors; for no executors could ſucceed to a freehold. Belonging therefore to nobody, like the *bæreditas jacens* of the Romans, the law left it open to be ſeiſed and appropriated by the firſt perſon that could enter upon it, during the life of *ceſtuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reverſion of the lands; for the reverſioner hath an equal right with any other man to enter upon the vacant poſſeſſion, and where the king's title and a ſubject's concur, the king's ſhall always be preferred: againſt the king therefore there could be no prior occupant, becauſe *nullum tempus occurrit regi* (d). And, even in the caſe of a ſubject, had the eſtate *pur auter vie* been granted to a man *and his heirs* during the life of *ceſtuy que vie*, there the heir might, and ſtill may, enter and hold poſſeſſion, and is called in law a *ſpecial occupant*; as having a ſpecial excluſive right, by the terms of the original grant, to enter upon and occupy this *bæreditas jacens*, during the reſidue of the eſtate granted: though ſome have thought him ſo called with no very great propriety (e); and that ſuch eſtate is rather a deſcendible freehold. But the title of common occupancy is now reduced almoſt to nothing by two ſtatutes; the one, 29 Car. II. c. 3. which enacts, that where there is no ſpecial occupant, in whom the eſtate may veſt, the tenant *pur auter vie* may deviſe it by will, or it ſhall go to the executors and be aſſets in their hands for payment of debts: the other that

(d) Co. Litt. 41. (e) Vaugh. 201.

of 14 Geo. II. c. 20. which enacts, that it ſhall veſt not only in the executors, but, in caſe the tenant dies inteſtate, in the adminiſtrators alſo; and go in a courſe of diſtribution like a chattel intereſt.

By theſe two ſtatutes the title of *common* occupancy is utterly extinct and aboliſhed: though that of *ſpecial* occupancy, by the heir at law, continues to this day; ſuch heir being held to ſucceed to the anceſtor's eſtate, not by deſcent, for then he muſt take an eſtate of inheritance, but as an occupant, ſpecially marked out and appointed by the original grant. The doctrine of common occupancy may however be uſefully remembered on the following account, among others: that, as by the common law no occupancy could be of incorporeal hereditaments, as of rents, tithes, advowſons, commons, or the like (f), (becauſe, with reſpect to them, there could be no actual entry made, or corporal ſeiſin had; and therefore by the death of the grantee *pur auter vie* a grant of ſuch hereditaments was entirely (g) determined) ſo now, I apprehend, notwithſtanding theſe ſtatutes, ſuch grant would be determined likewiſe; and the hereditaments would not be deviſable, nor veſt in the executors, nor go in a courſe of diſtribution. For the ſtatutes muſt not be conſtrued ſo as to create any new eſtate, or to keep that alive which by the common law was determined, and thereby to defer the grantor's reverſion; but merely to diſpoſe of an intereſt in being, to which by law there was no owner, and which therefore was left open to the firſt occupant. When there is a reſidue left, the ſtatutes give it to the executors, *&c.* inſtead of the firſt occupant; but they will not create a reſidue, on purpoſe to give it to the executors. They only meant to provide an appointed inſtead of a caſual, a certain inſtead of an uncertain, owner, of lands which before were nobody's; and thereby to ſupply this *caſus omiſſus*, and render the diſpoſition of law in all reſpects entirely uniform: this being the only inſtance wherein a title to a real eſtate could ever be acquired by occupancy.

(f) Co. Litt. 41. (g) Vaugh. 201.

This

THIS, I ſay, was the only inſtance; for I think there can be no other caſe deviſed, wherein there is not ſome owner of the land appointed by the law. In the caſe of a ſole corporation, as a parſon of a church, when he dies or reſigns, though there is no *actual* owner of the land till a ſucceſſor be appointed, yet there is a *legal, potential* ownerſhip, ſubſiſting in contemplation of law; and when the ſucceſſor is appointed, his appointment ſhall have a retroſpect and relation backwards, ſo as to entitle him to all the profits from the inſtant that the vacancy commenced. And, in all other inſtances, when the tenant dies inteſtate, and no other owner of the lands is to be found in the common courſe of deſcents, there the law veſts an ownerſhip in the king, or in the ſubordinate lord of the fee, by eſcheat.

So alſo in ſome caſes, where the laws of other nations give a right by occupancy, as in lands newly created, by the riſing of an iſland in a river, or by the alluvion or dereliction of the ſea; in theſe inſtances the law of England aſſigns them an immediate owner. For Bracton tells us (h), that if an iſland ariſe in the *middle* of a *river*, it belongs in common to thoſe who have lands on each ſide thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the neareſt ſhore: which is agreeable to, and probably copied from, the civil law (i). Yet this ſeems only to be reaſonable, where the ſoil of the river is equally divided between the owners of the oppoſite ſhores: for if the whole ſoil is the freehold of any one man, as it muſt be whenever a ſeveral fiſhery is claimed (k), there it ſeems juſt (and ſo is the uſual practice) that the eyotts or little iſlands, ariſing in any part of the river, ſhall be the property of him who owneth the piſcary and the ſoil. However, in caſe a new iſland riſe in the *ſea*, though the civil law gives it to the firſt occupant (l), yet ours gives it to the king (m). And as to lands gained from the ſea, either by *alluvion*, by

(h) *l.* 2. *c.* 2.
(i) *Inſt.* 2. 1. 22.
(k) Salk. 637.
(l) *Inſt.* 2. 1. 18.
(m) Bract. *l.* 2. *c.* 2. Callis of ſewers. 22.

the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual watermark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining (n). For *de minimis non curat lex:* and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king: for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry (o). So that the quantity of ground gained, and the time during which it is gained, are what make it either the king's or the subject's property. In the same manner if a river, running between two lordships, by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, he shall have what the river has left in any other place, as a recompence for this sudden loss (p). And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law (q); from whence indeed those our determinations seem to have been drawn and adopted: but we ourselves, as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before-mentioned, as upon this other general ground of prerogative, which was formerly remarked (r), that whatever hath no other owner is vested by law in the king.

(n) 2 Roll. Abr. 170. Dyer. 326.
(o) Callis. 24. 28.
(p) Callis. 28.
(q) *Inst.* 2. 1. 20, 21, 22, 23, 24.
(r) See Vol. I. p. 289.

CHAPTER

CHAPTER THE SEVENTEENTH.

OF TITLE BY PRESCRIPTION.

A THIRD method of acquiring real property by purchaſe is that by *preſcription*; as when a man can ſhew no other title to what he claims, than that he, and thoſe under whom he claims, have immemorially uſed to enjoy it. Concerning cuſtoms, or immemorial uſages, in general, with the ſeveral requiſites and rules to be obſerved, in order to prove their exiſtence and validity, we enquired at large in the preceding part of theſe commentaries (a). At preſent therefore I ſhall only, firſt, diſtinguiſh between *cuſtom*, ſtrictly taken, and *preſcription*; and then ſhew, what ſort of things may be preſcribed for.

AND, firſt, the diſtinction between cuſtom and preſcription is this; that cuſtom is properly a *local* uſage, and not annexed to any *perſon*; ſuch as, a cuſtom in the manor of Dale, that lands ſhall deſcend to the youngeſt ſon: preſcription is merely a *perſonal* uſage; as, that Sempronius, and his anceſtors, or thoſe whoſe eſtate he hath, have uſed time out of mind to have ſuch an advantage or privilege (b). As for example: if there be a uſage in the pariſh of Dale, that all the inhabitants of that pariſh may dance on a certain cloſe, at all times, for their recreation; (which is held (c) to be a lawful uſage) this is ſtrictly a cuſtom, for it is applied to the *place* in general, and not to any particular *perſons*: but if the tenant, who is ſeiſed of the manor of

(a) See Vol I p. 75, &c. (b) Co. Litt. 113. (c) 1 Lev. 176.

Dale in fee, alleges that he and his anceſtors, or all thoſe whoſe eſtate he hath in the ſaid manor, have uſed time out of mind to have common of paſture in ſuch a cloſe, this is properly called a preſcription; for this is a uſage annexed to the *perſon* of the owner of this eſtate. All preſcription muſt be either in a man and his anceſtors, or in a man and thoſe whoſe eſtate he hath (d); which laſt is called preſcribing in a *que eſtate*. And formerly a man might, by the common law, have preſcribed for a right which had been enjoyed by his anceſtors or predeceſſors at any diſtance of time, though his or their enjoyment of it had been ſuſpended (e) for an indefinite ſeries of years. But by the ſtatute of limitations, 32 Hen. VIII. c. 2. it is enacted, that no perſon ſhall make any preſcription by the ſeiſin or poſſeſſion of his anceſtor or predeceſſor, unleſs ſuch ſeiſin or poſſeſſion hath been within threeſcore years next before ſuch preſcirption made (f).

Secondly, as to the ſeveral ſpecies of things which may, or may not, be preſcribed for; we may, in the firſt place, obſerve, that nothing but incorporeal hereditaments can be claimed by preſcription; as a right of way, a common, *&c*; but that no preſcription can give a title to lands, and other corporeal ſubſtances, of which more certain evidence may be had (g). For no man can be ſaid to preſcribe, that he and his anceſtors have immemorially uſed to hold the caſtle of Arundel: for this is clearly another ſort of title; a title by corporal ſeiſin and inheritance, which is more permanent, and therefore more capable of proof, than that of preſcription. But, as to a right of way, a common, or the like, a man may be allowed to preſcribe; for of theſe there is no corporal ſeiſin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing elſe but immemorial uſage. 2. A preſcription muſt always be laid in him that is tenant

(d) 4 Rep. 32.
(e) Co. Litt. 113.
(f) This title, of preſcription, was well known in the Roman law by the name of *uſucapio*; (*Ff.* 41. 3. 3.) ſo called, becauſe a man, that gains a title by preſcription, may be ſaid *uſu rem capere*.
(g) Dr. & St. dial. 1. c. 8. Finch, 132.

of

of the fee. A tenant for life, for years, at will, or a copyholder, cannot preſcribe, by reaſon of the imbecillity of their eſtates (h). For, as preſcription is uſage beyond time of memory, it is abſurd that they ſhould pretend to preſcribe, whoſe eſtates commenced within the remembrance of man. And therefore the copyholder muſt preſcribe under cover of the lord's eſtate, and the tenant for life under cover of the tenant in fee-ſimple. As, if tenant for life of a manor would preſcribe for a right of common as appurtenant to the ſame, he muſt preſcribe under cover of the tenant in fee-ſimple; and muſt plead, that John Stiles and his anceſtors had immemorially uſed to have this right of common, appurtenant to the ſaid manor, and that John Stiles demiſed the ſaid manor, with its appurtenances, to him the ſaid tenant for life. 3. A preſcription cannot be for a thing which cannot be raiſed by grant. For the law allows preſcription only in ſupply of the loſs of a grant, and therefore every preſcription preſuppoſes a grant to have exiſted. Thus a lord of a manor cannot preſcribe to raiſe a tax or toll upon ſtrangers; for, as ſuch claim could never have been good by any grant, it ſhall not be good by preſcription (i). 4. A fourth rule is, that what is to ariſe by matter of record cannot be preſcribed for, but muſt be claimed by grant, entered on record: ſuch as, for inſtance, the royal franchiſes of deodands, felons' goods, and the like. Theſe, not being forfeited till the matter on which they ariſe is found by the inquiſition of a jury, and ſo made a matter of record, the forfeiture itſelf cannot be claimed by any inferior title. But the franchiſes of treaſure-trove, waifs, eſtrays, and the like, may be claimed by preſcription; for they ariſe from private contingencies, and not from any matter of record (k). 5. Among things incorporeal, which may be claimed by preſcription, a diſtinction muſt be made with regard to the manner of preſcribing; that is, whether a man ſhall preſcribe in a *que eſtate*, or in himſelf and his anceſtors. For, if a man preſcribes in a *que eſtate*, (that is, in himſelf and thoſe whoſe eſtate he holds)

(h) 4 Rep. 31, 32. (i) 1 Ventr. 337. (k) Co. Litt. 114.

nothing

nothing is claimable by this preſcription, but ſuch things as are incident, appendant, or appurtenant to lands; for it would be abſurd to claim any thing as the conſequence, or appendix, of an eſtate, with which the thing claimed has no connexion; but, if he preſcribes in himſelf and his anceſtors, he may preſcribe for any thing whatſoever that lies in grant; not only things that are appurtenant, but alſo ſuch as may be in groſs (l). Therefore a man may preſcribe, that he, and thoſe whoſe eſtate he hath in the manor of Dale, have uſed to hold the advowſon of Dale, as *appendant* to that manor: but, if the advowſon be a diſtinct inheritance, and not appendant, then he can only preſcribe in his anceſtors. So alſo a man may preſcribe in a *que eſtate* for a common *appurtenant* to a manor; but, if he would preſcribe for a common *in groſs*, he muſt preſcribe in himſelf and his anceſtors. 6. Laſtly, we may obſerve, that eſtates gained by preſcription are not, of courſe, deſcendible to the heirs general, like other purchaſed eſtates, but are an exception to the rule. For, properly ſpeaking, the preſcription is rather to be conſidered as an evidence of a former acquiſition, than as an acquiſition *de novo:* and therefore, if a man preſcribes for a right of way in himſelf and his anceſtors, it will deſcend only to the blood of that line of anceſtors in whom he ſo preſcribes; the preſcription in this caſe being indeed a ſpecies of deſcent. But, if he preſcribes for it in a *que eſtate*, it will follow the nature of that eſtate in which the preſcription is laid, and be inheritable in the ſame manner, whether that were acquired by deſcent or purchaſe: for every acceſſory followeth the nature of its principal.

(l) Litt. §. 183. Finch. L. 104.

CHAPTER

CHAPTER THE EIGHTEENTH.

OF TITLE BY FORFEITURE.

FORFEITURE is a puniſhment annexed by law to ſome illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loſes all his intereſt therein, and they go to the party injured, as a recompence for the wrong which either he alone, or the public together with himſelf, hath ſuſtained.

LANDS, tenements, and hereditaments, may be forfeited in various degrees and by various means: 1. By crimes and miſdemeſnors. 2. By alienation contrary to law. 3. By non-preſentation to a benefice, when the forfeiture is denominated a *lapſe*. 4. By ſimony. 5. By non-performance of conditions. 6. By waſte. 7. By breach of copyhold cuſtoms. 8. By bankruptcy.

I. THE foundation and juſtice of forfeitures for *crimes and miſdemeſnors*, and the ſeveral degrees of thoſe forfeitures, proportioned to the ſeveral offences, have been hinted at in the preceding volume (a); but will be more properly conſidered, and more at large, in the fourth book of theſe commentaries. At preſent I ſhall only obſerve in general, that the offences which induce a forfeiture of lands and tenements to the crown are principally the following ſix; 1. Treaſon. 2. Felony. 3. Miſpriſion of treaſon. 4. Praemunire. 5. Drawing

(a) Vol. I. pag. 289.

a weapon

weapon on a judge, or ſtriking any one in the preſence of the king's principal courts of juſtice. 6. Popiſh recuſancy, or non-obſervance of certain laws enacted in reſtraint of papiſts. But at what time they ſeverally commence, how far they extend, and how long they endure, will with greater propriety be reſerved as the object of our future enquiries.

II. LANDS and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which caſes the forfeiture ariſes from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. ALIENATION in *mortmain*, *in mortua manu*, is an alienation of lands or tenements to any corporation, ſole or aggregate, eccleſiaſtical or temporal. But theſe purchaſes having been chiefly made by religious houſes, in conſequence whereof the lands became perpetually inherent in one dead hand, this hath occaſioned the general appellation of mortmain to be applied to ſuch alienations (b), and the religious houſes themſelves to be principally conſidered in forming the ſtatutes of mortmain: in deducing the hiſtory of which ſtatutes, it will be matter of curioſity to obſerve the great addreſs and ſubtil contrivance of the eccleſiaſtics, in eluding from time to time the laws in being, and the zeal with which ſucceſſive parliaments have purſued them through all their fineſſes; how new remedies were ſtill the parents of new evaſions; till the legiſlature at laſt, though with difficulty, obtained a deciſive victory.

BY the common law any man might diſpoſe of his lands to any other private man at his own diſcretion, eſpecially when the feodal reſtraints of alienation were worn away. Yet in conſequence of theſe it always was, and is ſtill, neceſſary (c), for corporations to have a licence of mortmain

(b) See Vol. I. pag. 457. (c) F. N. B. 121.

from

from the crown, to enable them to purchaſe lands: for as the king is the ultimate lord of every fee, he ought not, unleſs by his own conſent, to loſe his privilege of eſcheats and other feodal profits, by the veſting of lands in tenants that can never be attainted or die. And ſuch licences of mortmain ſeem to have been neceſſary among the Saxons, about ſixty years before the Norman conqueſt (d). But, beſides this general licence from the king, as lord paramount of the kingdom, it was alſo requiſite, whenever there was a meſne or intermediate lord between the king and the alienor, to obtain his licence alſo (upon the ſame feodal principles) for the alienation of the ſpecific land. And if no ſuch licence was obtained, the king or other lord might reſpectively enter on the lands ſo aliened in mortmain, as a forfeiture. The neceſſity of this licence from the crown was acknowledged by the conſtitutions of Clarendon (e), in reſpect of advowſons, which the monks always greatly coveted, as being the groundwork of ſubſequent appropriations (f). Yet ſuch were the influence and ingenuity of the clergy, that (notwithſtanding this fundamental principle) we find that the largeſt and moſt conſiderable dotations of religious houſes happened within leſs than two centuries after the conqueſt. And (when a licence could not be obtained) their contrivance ſeems to have been this: that, as the forfeiture for ſuch alienation accrued in the firſt place to the immediate lord of the fee, the tenant who meant to alienate firſt conveyed his lands to the religious houſe, and inſtantly took them back again, to hold as tenant to the monaſtery; which kind of inſtantaneous ſeiſin was probably held not to occaſion any forfeiture: and then, by pretext of ſome other forfeiture, ſurrender, or eſcheat, the ſociety entered into thoſe lands in right of their newly acquired ſigniory, as immediate lords of the fee. But, when theſe dotations began to grow numerous, it was obſerved that the feodal ſervices, ordained for the defence of the kingdom, were every day viſibly withdrawn; that the circulation of landed property from man to man began to ſtagnate; and that the lords

(d) Selden. Jan. Angl. l. 2. §. 45.

(e) *Eccleſiae de feudo domini regis non poſſunt in perpetuum dari, abſque aſſenſu et conſenſione ipſius. c. 2. A. D.* 1164.

(f) See Vol. I. pag. 373.

were

were curtailed of the fruits of their ſigniories, their eſcheats, wardſhips, reliefs, and the like: and therefore, in order to prevent this, it was ordained by the ſecond of king Henry III's great charters (g), and afterwards by that printed in our common ſtatute-books, that all ſuch attempts ſhould be void, and the land forfeited to the lord of the fee (h).

But, as this prohibition extended only to religious *houſes*, biſhops and other ſole corporations were not included therein; and the aggregate eccleſiaſtical bodies (who, ſir Edward Coke obſerves (i), in this were to be commended, that they ever had of their counſel the beſt learned men that they could get) found many means to creep out of this ſtatute, by buying in lands that were, *bona fide*, holden of themſelves as lords of the fee, and thereby evading the forfeiture; or by taking long leaſes for years, which firſt introduced thoſe extenſive terms, for a thouſand or more years, which are now ſo frequent in conveyances. This produced the ſtatute *de religioſis*, 7 Edw. I; which provided, that no *perſon*, religious or other whatſoever, ſhould buy, or ſell, or receive, under pretence of a gift, or term of years, or any other title whatſoever, or ſhould by any art or ingenuity appropriate to himſelf, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

This ſeemed to be a ſufficient ſecurity againſt all alienations in mortmain: but, as theſe ſtatutes extended only to gifts and conveyances between the parties, the religious houſes now began to ſet up a fictitious title to the land, which it was intended they ſhould have, and to bring an ac-

(g) *A. D.* 1217. *cap.* 43. *edit. Oxon.*

(h) *Non licet alicui de caetero dare terram ſuam alicui domui religioſae, ita quod illam reſumat tenendum de eadem domo; nec liceat alicui domui religioſae terram alicujus ſic accipere, quod tradat illam ei a quo ipſam recepit tenendam: ſi quis autem de caetero terram ſuam domui religioſae ſic dederit, et ſuper hoc convincatur, donum ſuum penitus caſſetur, et terra illa domino ſuo illius feodi incurratur.* Mag. Cart. 9 Hen. III. c. 36.

(i) 2 Inſt. 75.

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tion to recover it againſt the tenant; who, by fraud and collusion, made no defence, and thereby judgment was given for the religious houſe, which then *recovered* the land by ſentence of law upon a ſuppoſed prior title. And thus they had the honour of inventing thoſe fictitious adjudications of right, which are ſince become the great aſſurance of the kingdom, under the name of *common recoveries*. But upon this the ſtatute of Weſtminſter the ſecond, 13 Edw. I. c. 32. enacted, that in ſuch caſes a jury ſhall try the true right of the demandants or plaintiffs to the land, and if the religious houſe or corporation be found to have it, they ſhall ſtill recover ſeiſin; otherwiſe it ſhall be forfeited to the immediate lord of the fee, or elſe to the next lord, and finally to the king, upon the immediate or other lord's default. And the like proviſion was made by the ſucceeding chapter (k), in caſe the tenants ſet up croſſes upon their lands (the badges of knights templars and hoſpitallers) in order to protect them from the feodal demands of their lords, by virtue of the privileges of thoſe religious and military orders. And ſo careful was this provident prince to prevent any future evaſions, that when the ſtatute of *quia emptores*, 18 Edw. I. aboliſhed all ſub-infeudations, and gave liberty for all men to alienate their lands to be holden of the next immediate lord (l), a proviſo was inſerted (m) that this ſhould not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's licence by a writ of *ad quod damnum* was marked out, by the ſtatute 27 Edw. I. ſt. 2. it was farther provided by ſtatute 34 Edw. I. ſt. 3. that no ſuch licence ſhould be effectual, without the conſent of the meſne or intermediate lords.

YET ſtill it was found difficult to ſet bounds to eccleſiaſtical ingenuity: for when they were driven out of all their former holds, they deviſed a new method of conveyance, by which the lands were granted, not to themſelves directly, but to nominal feoffees *to the uſe of* the religious houſes; thus diſtinguiſhing between the *poſſeſſion* and the *uſe*, and receiving

(k) *cap.* 33. (l) 2 Inſt. 501. (m) *cap.* 3.

the

the actual profits, while the ſeiſin of the land remained in the nominal feoffee: who was held by the courts of equity (then under the direction of the clergy) to be bound in conſcience to account to his *ceſtuy que uſe* for the rents and emoluments of the eſtate. And it is to theſe inventions that our practiſers are indebted for the introduction of uſes and truſts, the foundation of modern conveyancing. But, unfortunately for the inventors themſelves, they did not long enjoy the advantage of their new device, for the ſtatute 15 Rich. II. c. 5. enacts, that the lands which had been ſo purchaſed to uſes ſhould be amortiſed by licence from the crown, or elſe be ſold to private perſons; and that, for the future, uſes ſhall be ſubject to the ſtatutes of mortmain, and forfeitable like the lands themſelves. And whereas the ſtatutes had been eluded by purchaſing large tracts of land, adjoining to churches, and conſecrating them by the name of church-yards, ſuch ſubtile imagination is alſo declared to be within the compaſs of the ſtatutes of mortmain. And civil or lay corporations, as well as eccleſiaſtical, are alſo declared to be within the miſchief, and of courſe within the remedy provided by thoſe ſalutary laws. And, laſtly, as during the times of popery, lands were frequently given to ſuperſtitious uſes, though not to any corporate bodies; or were made liable in the hands of heirs and deviſees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed ſtate as actual alienations in mortmain; therefore, at the dawn of the reformation, the ſtatute 23 Hen. VIII. c. 10. declares, that all future grants of lands for any of the purpoſes aforeſaid, if granted for any longer term than twenty years, ſhall be void.

BUT, during all this time, it was in the power of the crown, by granting a licence of mortmain, to remit the forfeiture, ſo far as related to its own rights; and to enable any ſpiritual or other corporation to purchaſe and hold any lands or tenements in perpetuity: which prerogative is declared and confirmed by the ſtatute 18 Edw. III. ſt. 3. c. 3. But, as doubts were conceived at the time of the revolution how far ſuch licence was valid (n), ſince the king had no power

(n) 2 Hawk. P. C. 361.

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to diſpenſe with the ſtatutes of mortmain by a clauſe of *non obſtante* (o), which was the uſual courſe, though it ſeems to have been unneceſſary (p), and as, by the gradual declenſion of meſne ſignories through the long operation of the ſtatute of *quia emptores*, the rights of intermediate lords were reduced to a very ſmall compaſs; it was therefore provided by the ſtatute 7 & 8 Will. III. c. 37. that the crown for the future at its own diſcretion may grant licences to aliene or take in mortmain, of whomſoever the tenements may be holden.

AFTER the diſſolution of monaſteries under Henry VIII, though the policy of the next popiſh ſucceſſor affected to grant a ſecurity to the poſſeſſors of abbey lands, yet, in order to regain ſo much of them as either the zeal or timidity of their owners might induce them to part with, the ſtatutes of mortmain were ſuſpended for twenty years by the ſtatute of 1 & 2 P. & M. c. 8, and, during that time, any lands or tenements were allowed to be granted to any ſpiritual corporation without any licence whatſoever. And, long afterwards, for a much better purpoſe, the augmentation of poor livings, it was enacted by the ſtatute 17 Car. II. c. 3. that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l. per annum* may be augmented by the purchaſe of lands, without licence of mortmain in either caſe: and the like proviſion hath been ſince made, in favour of the governors of queen Anne's bounty (q). It hath alſo been held (r), that the ſtatute 23 Hen. VIII. before-mentioned did not extend to any thing but *ſuperſtitious* uſes; and that therefore a man may give lands for the maintenance of a ſchool, an hoſpital, or any other *charitable* uſes. But as it was apprehended from recent experience, that perſons on their deathbeds might make large and improvident diſpoſitions even for theſe good purpoſes, and defeat the political ends of the ſtatutes of mortmain; it is therefore enacted by the ſtatute 9 Geo. II. ch. 36. that no lands or tenements, or money

(o) Stat. 1. W. & M. ſt. 2. c. 2.
(p) Co. Litt. 99.
(q) Stat. 2 & 3 Ann. c. 11.
(r) 1 Rep. 24.

to be laid out thereon, ſhall be given for or charged with any *charitable* uſes whatſoever, unleſs by deed indented, executed in the preſence of two witneſſes twelve calendar months before the death of the donor, and enrolled in the court of chancery within ſix months after its execution, (except ſtocks in the public funds, which may be transferred within ſix months previous to the donor's death) and unleſs ſuch gift be made to take effect immediately, and be without power of revocation: and that all other gifts ſhall be void. The two univerſities, their colleges, and the ſcholars upon the foundation of the colleges of Eton, Wincheſter, and Weſtminſter, are excepted out of this act: but ſuch exemption was granted with this proviſo, that no college ſhall be at liberty to purchaſe more advowſons, than are equal in number to one moiety of the fellows or ſtudents, upon the reſpective foundations.

2. SECONDLY, alienation *to an alien* is alſo a cauſe of forfeiture to the crown of the lands ſo alienated, not only on account of his incapacity to hold them, which occaſions him to be paſſed by in deſcents of land (s), but likewiſe on account of his preſumption in attempting, by an act of his own, to acquire any real property; as was obſerved in the preceding volume (t).

3. LASTLY, alienations *by particular tenants*, when they are greater than the law entitles them to make, and deveſt the remainder or reverſion (v), are alſo forfeitures to him whoſe right is attacked thereby. As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail, or in fee: theſe being eſtates, which either muſt or may laſt longer than his own, the creating them is not only beyond his power, and inconſiſtent with the nature of his intereſt, but is alſo a forfeiture of his own particular eſtate to him in remainder or reverſion (u). For which there ſeem to be two reaſons. Firſt, becauſe ſuch alienation amounts to a renunciation of the feodal connexion and dependence; it implies a refuſal to perform the due ren-

(s) See pag. 249, 250.
(t) Book I. ch. 10.
(v) Co. Litt. 251.
(u) Litt. §. 415.

ders

ders and ſervices to the lord of the fee, of which fealty is conſtantly one; and it tends in its conſequences to defeat and deveſt the remainder or reverſion expectant; as therefore that is put in jeopardy, by ſuch act of the particular tenant, it is but juſt, that upon diſcovery, the particular eſtate ſhould be forfeited and taken from him, who has ſhewn ſo manifeſt an inclination to make an improper uſe of it. The other reaſon is, becauſe the particular tenant, by granting a larger eſtate than his own, has by his own act determined and put an entire end to his own original intereſt; and on ſuch determination the next taker is intitled to enter regularly, as in his remainder or reverſion. The ſame law, which is thus laid down with regard to tenants for life, holds alſo with reſpect to all tenants of the mere freehold, or of chattel intereſts; but if tenant in tail alienes in fee, this is no immediate forfeiture to the remainder-man, but a mere *diſcontinuance* (as it is called) (w) of the eſtate-tail, which the iſſue may afterwards avoid by due courſe of law (x): for he in remainder or reverſion hath only a very remote and barely poſſible intereſt therein, until the iſſue in tail is extinct. But, in caſe of ſuch forfeitures by particular tenants, all legal eſtates by them before created, as if tenant for twenty years grants a leaſe for fifteen, and all charges by him lawfully made on the lands, ſhall be good and available in law (y). For the law will not hurt an innocent leſſee for the fault of his leſſor; nor permit the leſſor, after he has granted a good and lawful eſtate, by his own act to avoid it, and defeat the intereſt which he himſelf has created.

EQUIVALENT, both in its nature and its conſequences, to an illegal alienation by the particular tenant, is the civil crime of *diſclaimer*; as where a tenant, who holds of any lord, neglects to render him the due ſervices, and, upon an action brought to recover them, diſclaims to hold of his lord. Which diſclaimer of tenure in any court of record is a forfeiture of the lands to the lord (z), upon reaſons moſt

(w) See Book III.
(x) Litt. §. 595, 6, 7.
(y) Co. Litt. 233.
(z) Finch, 270, 271.

apparently feodal. And ſo likewiſe, if in any court of record the particular tenant does any act which amounts to a virtual diſclaimer; if he claims any greater eſtate than was granted him at the firſt infeodation, or takes upon himſelf thoſe rights which belong only to tenants of a ſuperior claſs (a); if he affirms the reverſion to be in a ſtranger, by accepting his fine, attorning as his tenant, colluſive pleading, and the like (b); ſuch behaviour amounts to a forfeiture of his particular eſtate.

III. LAPSE is a ſpecies of forfeiture, whereby the right of preſentation to a church accrues to the ordinary by neglect of the patron to preſent, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the intereſt of religion, and the good of the public, that the church ſhould be provided with an officiating miniſter, the law has therefore given this right of lapſe, in order to quicken the patron; who might otherwiſe, by ſuffering the church to remain vacant, avoid paying his eccleſiaſtical dues, and fruſtrate the pious intentions of his anceſtors. This right of lapſe was firſt eſtabliſhed about the time (though not by the authority) (c) of the council of Lateran (d), which was in the reign of our Henry the ſecond, when the biſhops firſt began to exerciſe univerſally the right of inſtitution to churches (e). And therefore where there is no right of inſtitution, there is no right of lapſe: ſo that no donative can lapſe to the ordinary (f), unleſs it hath been augmented by the queen's bounty (g). But no right of lapſe can accrue, when the original preſentation is in the crown (h).

THE term, in which the title to preſent by lapſe accrues from the one to the other ſucceſſively, is ſix calendar months (i); (following in this caſe the computation of the church, and not the uſual one of the common law) and this

(a) Co. Litt. 252.
(b) *Ibid.* 253.
(c) 2 Roll. Abr. 336. pl. 10.
(d) Bracton, *l.* 4. *tr.* 2. c. 3.
(e) See p. 23.
(f) Bro. *Abr. tit. Quar. Imped.* 131. Cro. Jac. 518.
(g) Stat. 1 Geo. I. ſt. 2. c. 10.
(h) Stat. 17 Edw. II. c. 8. 2 Inſt. 273.
(i) 6 Rep 62. Regiſtr. 42.

excluſive

excluſive of the day of the avoidance (k). But, if the biſhop be both patron and ordinary, he ſhall not have a double time allowed him to collate in (l); for the forfeiture accrues by law, whenever the negligence has continued ſix months in the ſame perſon. And alſo, if the biſhop doth not collate his own clerk immediately to the living, and the patron preſents, though after the ſix months are lapſed, yet his preſentation is good, and the biſhop is bound to inſtitute the patron's clerk (m). For as the law only gives the biſhop this title by lapſe, to puniſh the patron's negligence, there is no reaſon that, if the biſhop himſelf be guilty of equal or greater negligence, the patron ſhould be deprived of his turn. If the biſhop ſuffer the preſentation to lapſe to the metropolitan, the patron alſo has the ſame advantage if he preſents before the arch-biſhop has filled up the benefice; and that for the ſame reaſon. Yet the ordinary cannot, after lapſe to the metropolitan, collate his own clerk to the prejudice of the arch-biſhop (n). For he had no permanent right and intereſt in the advowſon, as the patron hath, but merely a temporary one; which having neglected to make uſe of during the time, he cannot afterwards retrieve it. But if the preſentation lapſes to the king, prerogative here intervenes and makes a difference; and the patron ſhall never recover his right, till the king has ſatisfied his turn by preſentation: for *nullum tempus occurrit regi* (o). And therefore it may ſeem, as if the church might continue void for ever, unleſs the king ſhall be pleaſed to preſent; and a patron thereby be abſolutely defeated of his advowſon. But to prevent this inconvenience, the law has lodged a power in the patron's hands, of as it were compelling the king to preſent. For if, during the delay of the crown, the patron himſelf preſents, and his clerk is inſtituted, the king indeed by preſenting another may turn out the patron's clerk; but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king has loſt his right, which was only to the next or firſt preſentation (p).

(k) 2 Inſt. 361.
(l) Gibſ. Cod. 769.
(m) 2 Inſt. 273.
(n) 2 Roll. Abr. 368.
(o) Dr. & St. d. 2. c. 36. Cro. Car. 355.
(p) 7 Rep. 28. Cro. Eliz. 44.

IN caſe the benefice becomes void by death, the ceſſion through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for theſe are matters of equal notoriety to the patron and ordinary: but in caſe of a vacancy by reſignation, or canonical deprivation, or if a clerk preſented be refuſed for inſufficiency, theſe being matters of which the biſhop alone is preſumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwiſe he can take no advantage by way of lapſe (q). Neither ſhall any lapſe thereby accrue to the metropolitan or to the king; for it is univerſally true, that neither the arch-biſhop or the king ſhall ever preſent by lapſe, but where the immediate ordinary might have collated by lapſe, within the ſix months, and hath exceeded his time: for the firſt ſtep or beginning faileth, *et quod non habet principium, non habet finem* (r). If the biſhop refuſe or neglect to examine and admit the patron's clerk, without good reaſon aſſigned or notice given, he is ſtiled a diſturber by the law, and ſhall not have any title to preſent by lapſe; for no man ſhall take advantage of his own wrong (s). Alſo if the right of preſentation be litigious or conteſted, and an action be brought againſt the biſhop to try the title, no lapſe ſhall incur till the queſtion of right be decided (t).

IV. BY *ſimony*, the right of preſentation to a living is forfeited, and veſted *pro hac vice* in the crown. Simony is the corrupt preſentation of any one to an eccleſiaſtical benefice for money, gift, or reward. It is ſo called from the reſemblance it is ſaid to bear to the ſin of Simon Magus, though the purchaſing of holy orders ſeems to approach nearer to his offence. It was by the canon law a very grievous crime: and is ſo much the more odious, becauſe, as ſir Edward Coke obſerves (u), it is ever accompanied with perjury; for the preſentee is ſworn to have committed no ſimony. However it is not an offence puniſhable in a cri-

(q) 4 Rep. 75. 2 Inſt. 632.
(r) Co. Litt. 344, 345.
(s) 2 Roll. Abr. 369.
(t) Co. Litt. 344.
(u) 3 Inſt. 156.

minal

minal way at the common law (w); it being thought ſufficient to leave the clerk to eccleſiaſtical cenſures. But as theſe did not affect the ſimoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to reſtrain it by means of civil forfeitures; which the modern prevailing uſage, with regard to ſpiritual preferments, calls aloud to be put in execution. I ſhall briefly conſider them in this place, becauſe they diveſt the corrupt patron of the right of preſentation, and veſt a new right in the crown.

By the ſtatute 31 Eliz. c. 6. it is for avoiding of ſimony enacted, that if any patron for any corrupt conſideration, by gift or promiſe, directly or indirectly, ſhall preſent or collate any perſon to an eccleſiaſtical benefice or dignity; ſuch preſentation ſhall be void, and the preſentee be rendered incapable of ever enjoying the ſame benefice: and the crown ſhall preſent to it for that turn only (x). Alſo by the ſtatute 12 Ann. ſtat. 2. c. 12. if any perſon for money or profit ſhall procure, in his own name or the name of any other, the next preſentation to any living eccleſiaſtical, and ſhall be preſented thereupon, this is declared to be a ſimoniacal contract; and the party is ſubjected to all the eccleſiaſtical penalties of ſimony, is diſabled from holding the benefice, and the preſentation devolves to the crown.

Upon theſe ſtatutes many queſtions have ariſen, with regard to what is, and what is not ſimony. And, among others, theſe points ſeem to be clearly ſettled: 1. That to purchaſe a preſentation, the living being actually vacant, is open and notorious ſimony (y); this being expreſsly in the face of the ſtatute. 2. That for a clerk to bargain for the next preſentation, the incumbent being ſick and about to die, was ſimony, even before the ſtatute of queen Anne (z): and now, by that ſtatute, to purchaſe, either in his own name or another's, the next preſentation, and be thereupon

(w) Moor. 564.
(x) For other penalties inflicted by this ſtatute, ſee Book IV.
(y) Cro. Eliz. 788. Moor. 914.
(z) Hob. 165.

preſented at any future time to the living, is direct and palpable ſimony. But, 3. It is held that for a father to purchaſe ſuch a preſentation, in order to provide for his ſon, is not ſimony: for the ſon is not concerned in the bargain, and the father is by nature bound to make a proviſion for him (a). 4. That if a ſimoniacal contract be made with the patron, the clerk not being privy thereto, the preſentation for that turn ſhall indeed devolve to the crown, as a puniſhment of the guilty patron; but the clerk who is innocent, does not incur any diſability or forfeiture (b). 5. That bonds given to pay money to charitable uſes, on receiving a preſentation to a living, are not ſimoniacal (c), provided the patron or his relations be not benefited thereby (d); for this is no corrupt conſideration, moving to the patron. 6. That bonds of reſignation, in caſe of non-reſidence or taking any other living, are not ſimoniacal (e); there being no corrupt conſideration herein, but ſuch only as is for the good of the public. So alſo bonds to reſign, when the patron's ſon comes to canonical age, are legal; upon the reaſon before given, that the father is bound to provide for his ſon (f). 7. Laſtly, general bonds to reſign at the patron's requeſt are held to be legal (g): for they may poſſibly be given for one of the legal conſiderations before-mentioned; and where there is a poſſibility that a tranſaction may be fair, the law will not ſuppoſe it iniquitous without proof. But, if the party can prove the contract to have been a corrupt one, ſuch proof will be admitted, in order to ſhew the bond ſimoniacal, and therefore void. Neither will the patron be ſuffered to make an ill uſe of ſuch a general bond of reſignation; as by extorting a compoſition for tithes, procuring an annuity for his relation, or by demanding a reſignation wantonly and without good cauſe, ſuch as is approved by the law; as, for the benefit of his own ſon, or on account of non-reſidence, plurality of livings, or groſs immorality in the incumbent (h).

(a) Cro. Eliz. 686. Moor. 916.
(b) 3 Inſt. 154. Cro. Jac. 385.
(c) Noy. 142.
(d) Stra. 534.
(e) Cro. Car. 180.
(f) Cro. Jac. 248. 274.
(g) Cro. Car. 180. Stra. 227.
(h) 1 Vern. 411. 1 Equ. Caſ. abr. 86, 87. Stra. 534.

V. THE

V. THE next kind of forfeitures are thoſe by *breach* or non-performance of a *condition* annexed to the eſtate, either expreſsly by deed at its original creation, or impliedly by law from a principle of natural reaſon. Both which we conſidered at large in a former chapter (i).

VI. I THEREFORE now proceed to another ſpecies of forfeiture, viz. by *waſte*. Waſte, *vaſtum*, is a ſpoil or deſtruction in houſes, gardens, trees, or other corporeal hereditaments, to the diſheriſon of him that hath the remainder or reverſion in fee-ſimple or fee-tail (k).

WASTE is either *voluntary*, which is a crime of commiſſion, as by pulling down a houſe; or it is *permiſſive*, which is a matter of omiſſion only, as by ſuffering it to fall for want of neceſſary reparations. Whatever does a laſting damage to the freehold or inheritance is waſte (l). Therefore removing wainſcot, floors, or other things once fixed to the freehold of a houſe, is waſte (m). If a houſe be deſtroyed by tempeſt, lightening, or the like, which is the act of Providence, it is no waſte: but otherwiſe, if the houſe be burnt by the careleſſneſs or negligence of the leſſee; tho' now by the ſtatute 6 Ann. c. 31. no action will lie againſt a tenant for an accident of this kind. Waſte may alſo be committed in ponds, dove-houſes, warrens, and the like; by ſo reducing the number of the creatures therein, that there will not be ſufficient for the reverſioner when he comes to the inheritance (n). Timber alſo is part of the inheritance (o). Such are oak, aſh, and elm in all places: and in ſome particular countries, by local cuſtom, where other trees are generally uſed for building, they are thereupon conſidered as timber; and to cut down ſuch trees, or top them, or do any other act whereby the timber may decay, is waſte (p). But un-

(i) See chap. 10. pag. 152.
(k) Co. Litt. 53.
(l) Hetl. 35.
(m) 4 Rep. 64.
(n) Co. Litt. 53.
(o) 4 Red. 62.
(p) Co. Litt. 53.

derwood

derwood the tenant may cut down at any ſeaſonable time that he pleaſes (q); and may take ſufficient eſtovers of common right for houſe-bote and cart-bote; unleſs reſtrained (which is uſual) by particular covenants and exceptions (r). The converſion of land from one ſpecies to another is waſte. To convert wood, meadow, or paſture, into arable; to turn arable, meadow, or paſture, into woodland; or to turn arable or woodland into meadow or paſture, are all of them waſte (s). For, as ſir Edward Coke obſerves (t), it not only changes the courſe of huſbandry, but the evidence of the eſtate; when ſuch a cloſe, which is conveyed and deſcribed as paſture, is found to be arable, and *e converſo*. And the ſame rule is obſerved, for the ſame reaſon, with regard to converting one ſpecies of edifice into another, even though it is improved in its value (u). To open the land to ſearch for mines of metal, coal, *&c.* is waſte; for that is a detriment to the inheritance (w): but, if the pits or mines were open before, it is no waſte for the tenant to continue digging them for his own uſe (x); for it is now become the mere annual profit of the land. Theſe three are the general heads of waſte, viz. in houſes, in timber, and in land. Though, as was before ſaid, whatever tends to the deſtruction, or depreciating the value, of the inheritance, is conſidered by the law as waſte.

Let us next ſee, who are liable to be puniſhed for committing waſte. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vaſals or feudatories; "*ſi vaſallus feudum diſſipaverit, aut inſigni detrimento deterius fecerit, privabitur* (y)." But in our antient common law the rule was by no means ſo large; for not only he that was ſeiſed of an eſtate of inheritance might do as he pleaſed with it, but alſo waſte was not puniſhable in any tenant, ſave only in three perſons; guardian in chivalry, tenant in dower, and tenant by the

(q) 2 Roll. Abr. 817.
(r) Co. Litt. 41.
(s) Hob. 296.
(t) 1 Inſt. 53.
(u) 1 Lev 309.
(w) 5 Rep. 12.
(x) Hob. 295.
(y) Wright. 44.

curteſy;

curteſy (z); and not in tenant for life or years (a). And the reaſon of the diverſity was, that the eſtate of the three former was created by the act of the law itſelf, which therefore gave a remedy againſt them: but tenant for life, or for years, came in by the demiſe and leaſe of the owner of the fee, and therefore he might have provided againſt the committing of waſte by his leſſee; and if he did not, it was his own default. But, in favour of the owners of the inheritance, the ſtatutes of Marlbridge (b) and Gloceſter (c) provided, that the writ of waſte ſhall not only lie againſt tenants by the law of England, (or curteſy) and thoſe in dower, but againſt any farmer or other that holds in any manner for life or years. So that, for above five hundred years paſt, all tenants for life or for any leſs eſtate, have been puniſhable or liable to be impeached for waſte, both voluntary and permiſſive; unleſs their leaſes be made, as ſometimes they are, without impeachment for waſte, *abſque impetitione vaſti*; that is, with a proviſion or protection that no man ſhall *impetere*, or ſue him, for waſte committed.

THE puniſhment for waſte committed was, by common law and the ſtatute of Marlbridge, only ſingle damages (d); except in the caſe of a guardian, who alſo forfeited his wardſhip (e) by the proviſions of the great charter (f): but the ſtatute of Gloceſter directs, that the other four ſpecies of tenants ſhall loſe and forfeit the place wherein the waſte is committed, and alſo treble damages, to him that hath the inheritance. The expreſſion of the ſtatute is, "he ſhall "forfeit the *thing* which he hath waſted;" and it hath been determined, that under theſe words the *place* is alſo included (g). And if the waſte be done *ſparſim*, or here and there, all over a wood, the whole wood ſhall be recovered: or if in ſeveral rooms of a houſe, the whole houſe ſhall be forfeited (h); becauſe it is impracticable for the reverſioner to enjoy only the identical places waſted, when lying

(z) It was however a doubt whether waſte was puniſhable at the common law in tenant by the curteſy. Regiſt. 72. Bro. Abr. *tit. waſte*. 88. 2 Inſt. 301.
(a) 2 Inſt. 299.
(b) 52 Hen. III. c. 23.
(c) 6 Edw. I. c. 5.
(d) 2 Inſt. 146.
(e) *Ibid.* 300.
(f) 9 Hen. III. c. 4.
(g) 2 Inſt. 303.
(h) Co. Litt. 54.

inter-

interſperſed with the other. But if waſte be done only in one end of the wood (or perhaps in one room of a houſe) if that can be conveniently ſeparated from the reſt, that part only is the *locus vaſtatus*, or thing waſted, and that only ſhall be forfeited to the reverſioner (i).

VII. A SEVENTH ſpecies of forfeiture is that of *copyhold* eſtates by *breach* of the *cuſtoms* of the manor. Copyhold eſtates are not only liable to the ſame forfeitures as thoſe which are held in ſocage, for treaſon, felony, alienation and waſte; whereupon the lord may ſeiſe them without any preſentment by the homage (k); but alſo to peculiar forfeitures, annexed to this ſpecies of tenure, which are incurred by the breach of either the general cuſtoms of all copyholds, or the peculiar local cuſtoms of certain particular manors. And we may obſerve that, as theſe tenements were originally holden by the loweſt and moſt abject vaſals, the marks of feodal dominion continue much the ſtrongeſt upon this mode of property. Moſt of the offences, which occaſioned a reſumption of the fief by the feodal law, and were denominated *feloniae, per quas vaſallus amitteret feudum* (l), ſtill continue to be cauſes of forfeiture in many of our modern copyholds. As, by ſubtraction of ſuit and ſervice (m); *ſi dominum deſervire noluerit* (n): by diſclaiming to hold of the lord, or ſwearing himſelf not his copyholder (o); *ſi dominum ejuravit, i. e. negavit ſe a domino feudum habere* (p): by neglect to be admitted tenant within a year and a day (q); *ſi per annum et diem ceſſaverit in petenda inveſtitura* (r); by contumacy in not appearing in court after three proclamations (s); *ſi a domino ter citatus non comparuerit* (t); or by refuſing, when ſworn of the homage, to preſent the truth according to his oath (u); *ſi pares veritatem noverint, et dicant ſe neſcire, cum ſciant* (w). In theſe, and a variety

(i) 2 Inſt. 304.
(k) Ventr 38. Cro. Eliz. 499.
(l) *Feud. l.* 2. *t.* 26. *in calc.*
(m) 3 Leon. 108. Dyer. 211.
(n) *Feud. l* 1. *t.* 21.
(o) Co. Copyh. §. 57.
(p) *Feud. l.* 2. *t.* 3. & *t.* 26. §. 3.
(q) Plowd. 372.
(r) *Feud. l.* 2. *t.* 24.
(s) 8 Rep. 99. Co. Copyh. §. 57.
(t) *Feud. l.* 2. *t.* 22.
(u) Co. Copyh. §. 57.
(w) *Feud. l.* 2. *t.* 58.

of

of other caſes, which it is impoſſible here to enumerate, the forfeiture does not accrue to the lord till after the offences are preſented by the homage, or jury of the lord's court baron (x); *per laudamentum parium ſuorum* (y): or, as it is more fully expreſſed in another place (z), *nemo miles adimatur de poſſeſſione ſui beneficii, niſi convicta culpa, quae ſit laudanda* (a) *per judicium parium ſuorum.*

VIII. THE eighth and laſt method, whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate perſon may, from the ſeveral deſcriptions given of him in our ſtatute law, be thus defined: a trader, who ſecretes himſelf, or does certain other acts, tending to defraud his creditors.

WHO ſhall be ſuch a trader, or what acts are ſufficient to denominate him a bankrupt, with the ſeveral connected conſequences reſulting from that unhappy ſituation, will be better conſidered in a ſubſequent chapter; when we ſhall endeavour more fully to explain its nature, as it moſt immediately relates to perſonal goods and chattels. I ſhall only here obſerve the manner in which the property of lands and tenements are transferred, upon the ſuppoſition that the owner of them is clearly and indiſputably a bankrupt; and that a commiſſion of bankrupt is awarded and iſſued againſt him.

BY the ſtatute 13 Eliz. c. 7. the commiſſioners for that purpoſe, when a man is declared a bankrupt, ſhall have full power to diſpoſe of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which ſhall deſcend or come to him at any time afterwards, before his debts are ſatisfied or agreed for; and all lands and tenements which were purchaſed by him jointly with his wife or children to his own uſe, (or ſuch

(x) Co. Copyh. §. 58.
(y) *Feud. l.* 1. *t.* 21.
(z) *Ibid. t.* 22.
(a) *i. e. arbitranda, definienda.* Du Freſne. IV. 79.

intereſt

intereſt therein as he may lawfully part with) or purchaſed with any other perſon upon ſecret truſt for his own uſe; and to cauſe them to be appraiſed to their full value, and to ſell the ſame by deed indented and inrolled, or divide them proportionably among the creditors. The ſtatute expreſsly includes not only free, but copyhold, lands: but did not extend to eſtates-tail, farther than for the bankrupt's life; nor to equities of redemption on a mortgaged eſtate, wherein the bankrupt has no legal intereſt, but only an equitable reverſion. Whereupon the ſtatute 21 Jac. I. c. 19. enacts, that the commiſſioners ſhall be impowered to ſell or convey, by deed indented and inrolled, any lands or tenements of the bankrupt, wherein he ſhall be ſeiſed of an eſtate-tail in poſſeſſion, remainder, or reverſion, unleſs the remainder or reverſion thereof ſhall be in the crown; and that ſuch ſale ſhall be good againſt all ſuch iſſues in tail, remainder-men, and reverſioners, whom the bankrupt himſelf might have barred by a common recovery, or other means: and that all equities of redemption upon mortgaged eſtates, ſhall be at the diſpoſal of the commiſſioners; for they ſhall have power to redeem the ſame, as the bankrupt himſelf might have done, and after redemption to ſell them. And alſo, by this and a former act (b), all fraudulent conveyances to defeat the intent of theſe ſtatutes are declared void; but that no purchaſor *bona fide*, for a good or valuable conſideration, ſhall be affected by the bankrupt laws, unleſs the commiſſion be ſued forth within five years after the act of bankruptcy committed.

By virtue of theſe ſtatutes a bankrupt may loſe all his real eſtates; which may at once be transferred by his commiſſioners to their aſſignees, without his participation or conſent.

b) 1 Jac. I. c. 15.

Chapter

CHAPTER THE NINETEENTH.

OF TITLE BY ALIENATION.

THE moſt uſual and univerſal method of acquiring a title to real eſtates is that of alienation, conveyance, or purchaſe in its limited ſenſe: under which may be comprized any method wherein eſtates are voluntarily reſigned by one man, and accepted by another; whether that be effected by ſale, gift, marriage ſettlement, deviſe, or other tranſmiſſion of property by the mutual conſent of the parties.

THIS means of taking eſtates, by alienation, is not of equal antiquity in the law of England with that of taking them by deſcent. For we may remember that, by the feodal law (a), a pure and genuine feud could not be transferred from one feudatory to another without the conſent of the lord; leſt thereby a feeble or ſuſpicious tenant might have been ſubſtituted and impoſed upon him, to perform the feodal ſervices, inſtead of one on whoſe abilities and fidelity he could depend. Neither could the feudatory then ſubject the land to his debts: for, if he might, the feodal reſtraint of alienation would have been eaſily fruſtrated and evaded (b). And, as he could not aliene it in his life-time, ſo neither could he by will defeat the ſucceſſion, by deviſing his feud to another family; nor even alter the courſe of it, by impoſing particular limitations, or preſcribing an unuſual path of deſcent. Nor, in ſhort, could he aliene the eſtate, even with the conſent of the lord, unleſs he had alſo obtained the conſent of his own next apparent, or pre umptive heir (c). And therefore it was very uſual in antient feoffments to ex-

(a) See pag. 57.
(b) *Feud. l.* 1. *t.* 27.
(c) Co. Litt. 94. Wright. 168.

preſs,

preſs, that the alienation was made by conſent of the heirs of the feoffor; or ſometimes for the heir apparent himſelf to join with the feoffor in the grant (d). And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his ſigniory without the conſent of his vaſal: for it was eſteemed unreaſonable to ſubject a feudatory to a new ſuperior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprized of it, that he might know with certainty to whom his renders and ſervices were due, and be able to diſtinguiſh a lawful diſtreſs for rent from a hoſtile ſeiſing of his cattle by the lord of a neighbouring clan (e). This conſent of the vaſal was expreſſed by what was called *attorning* (f), or profeſſing to become the tenant of the new lord; which doctrine of attornment was afterwards extended to all leſſees for life or years. For if one bought an eſtate with any leaſe for life or years ſtanding out thereon, and the leſſee or tenant refuſed to attorn to the purchaſor, and to become his tenant, the grant or contract was in moſt caſes void, or at leaſt incomplete (g): which was alſo an additional clog upon alienations.

But by degrees this feodal ſeverity is worn off; and experience hath ſhewn, that property beſt anſwers the purpoſes of civil life, eſpecially in commercial countries, when its transfer and circulation are totally free and unreſtrained. The road was cleared in the firſt place by a law of king Henry the firſt, which allowed a man to ſell and diſpoſe of lands which he himſelf had purchaſed; for over theſe he was thought to have a more extenſive power, than over what had been tranſmitted to him in a courſe of deſcent from his anceſtors (h): a doctrine, which is countenanced by the

(d) Madox, *Formul. Angl.* nº. 316. 319. 427.

(e) Gilb. Ten. 75.

(f) The ſame doctrine and the ſame denomination prevailed in Bretagne. —*poſſeſſiones in juriſdictionalibus non aliter apprehendi poſſe, quam per attournances et avirances, ut loqui ſolent; cum vaſallus, ejurato prioris domini obſequio et fide, novo ſe ſacramento, novo item domino acquirenti obſtringebat; idque juſſu auctoris.* D'Argentre *Antiq. Conſuet. Brit.* apud Duſreſne. i. 819, 820.

(g) Litt. §. 551.

(h) *Emptiones vel acquiſitiones ſuas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem ſuam.* LL. Hen. I. c. 70.

feodal

feodal conſtitutions themſelves (j): but he was not allowed to ſell the whole of his own acquirements, ſo as totally to diſinherit his children, any more than he was at liberty to aliene his paternal eſtate (i). Afterwards a man ſeems to have been at liberty to part with all his own acquiſitions, if he had previouſly purchaſed to him and his *aſſigns* by name; but, if his *aſſigns* were not ſpecified in the purchaſe deed, he was not empowered to aliene (k): and alſo he might part with one fourth of the inheritance of his anceſtors without the conſent of his heir (l). By the great charter of Henry III. (m), no ſubinfeudation was permitted of part of the land, unleſs ſufficient was left to anſwer the ſervices due to the ſuperior lord, which ſufficiency was probably interpreted to be one half or moiety of the land (n). But theſe reſtrictions were in general removed by the ſtatute of *quia emptores* (o), whereby all perſons, except the king's tenants *in capite*, were left at liberty to aliene all or any part of their lands at their own diſcretion (p). And even theſe tenants *in capite* were by the ſtatute 1 Edw. III. c. 12. permitted to aliene, on paying a fine to the king (q). By the temporary ſtatutes 11 Hen. VII. c. 3. and 3 Hen. VIII. c. 4. all perſons attending the king in his wars were allowed to aliene their lands without licence, and were relieved from other feodal burthens. And, laſtly, theſe very fines for alienations were, in all caſes of freehold tenure, entirely aboliſhed by the ſtatute 12 Car. II. c. 24. As to the power of *charging* lands with the debts of the owner, this was introduced ſo early as ſtatute Weſtm. 2. which (r) ſubjected a *moiety* of the tenant's lands to executions, for debts recovered by law; as the *whole* of them was likewiſe ſubjected to be pawned in a ſtatute merchant by the ſtatute *de mercatoribus*, made the ſame year, and in a ſtatute ſtaple by ſtatute 27 Edw. III. c. 9. and in other ſimilar recognizances by ſtatute 23 Hen.

(j) *Feud. l.* 2. *t.* 39.

(i) *Si queſtum tantum habuerit ir, qui partem terrae ſuæ donare voluerit, tunc quidem hoc ei licet; ſed non totum queſtum, quia non poteſt filium ſuum haeredem exhaeredare.* Glanv. *l.* 7. *c.* 1.

(k) Mirr. c. 1. §. 3. This is alſo borrowed from the feodal law. *Feud. l.* 2. *t.* 48.

(l) Mirr. *ibid.*

(m) 9 Hen. III. c. 32.

(n) Dalrymple of feuds, 95.

(o) 18 Edw. I. c. 1.

(p) See pag. 72.

(q) 2 Inſt. 67.

(r) 13 Edw. I. c. 18.

VIII. c. 6. And, now, the whole of them is not only ſubject to be *pawned* for the debts of the owner, but likewiſe to be abſolutely *ſold* for the benefit of trade and commerce by the ſeveral ſtatutes of bankruptcy. The reſtraint of *deviſing* lands by will, except in ſome places by particular cuſtom, laſted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued ſtill later than any of the reſt, and became extremely troubleſome, though many methods were invented to evade them; till, at laſt, they were made no longer neceſſary, by ſtatutes 4 & 5 Ann. c. 16. and 11 Geo. II. c. 19.

IN examining the nature of alienation, let us firſt enquire, briefly, *who* may aliene and to *whom*; and then, more largely, *how* a man may aliene, or the ſeveral modes of conveyance.

I. WHO may aliene, and to whom; or, in other words, who is capable of conveying, and who of purchaſing. And herein we muſt conſider rather the incapacity, than capacity, of the ſeveral parties: for all perſons in *poſſeſſion* are, *prima facie*, capable both of conveying and purchaſing, unleſs the law has laid them under any particular diſabilities. But, if a man has only in him the *right* of either poſſeſſion or property, he cannot convey it to any other, leſt pretended titles might be granted to great men, whereby juſtice might be trodden down, and the weak oppreſſed (s). Yet reverſions and veſted remainders may be granted; becauſe the poſſeſſion of the particular tenant is the poſſeſſion of him in reverſion or remainder: but *contingencies*, and mere *poſſibilities*, though they may be releaſed, or deviſed by will, or may paſs to the heir or executor, yet cannot (it hath been ſaid) be aſſigned to a ſtranger, unleſs coupled with ſome preſent intereſt (t).

PERSONS attainted of treaſon, felony, and *præmunire*, are incapable of conveying, from the time of the offence com-

(s) Co. Litt. 214. 239, 322. 11 Mod. 152. 1. P. Wms.
(t) Sheppard's touchſtone, 238, 574. Stra. 132.

committed, provided attainder follows (t): for ſuch conveyance by them may tend to defeat the king of his forfeiture, or the lord of his eſcheat. But they may *purchaſe* for the benefit of the crown, or the lord of the fee, tho' they are diſabled to *hold*: the lands ſo purchaſed, if after attainder, being ſubject to immediate forfeiture; if before, to eſcheat as well as forfeiture, according to the nature of the crime (u). So alſo corporations, religious or others, may purchaſe lands; yet, unleſs they have a licence to hold in mortmain, they cannot retain ſuch purchaſe; but it ſhall be forfeited to the lord of the fee.

IDIOTS and perſons of nonſane memory, infants, and perſons under dureſs, are not totally diſabled either to convey or purchaſe, but *ſub modo* only. For their conveyances and purchaſes are voidable, but not actually void. The king indeed, on behalf of an idiot, may avoid his grants or other acts (w). But it hath been ſaid, that a *non compos* himſelf, though he be afterwards brought to a right mind, ſhall not be permitted to alledge his own inſanity in order to avoid ſuch grant: for that no man ſhall be allowed to ſtultify himſelf, or plead his own diſability. The progreſs of this notion is ſomewhat curious. In the time of Edward I, *non compos* was a ſufficient plea to avoid a man's own bond (x): and there is a writ in the regiſter (y) for the alienor himſelf to recover lands aliened by him during his inſanity; *dum fuit non compos mentis ſuae, ut dicit, &c.* But under Edward III. a ſcruple began to ariſe, whether a man ſhould be permitted to *blemiſh* himſelf, by pleading his own inſanity (z): and, afterwards, a defendant in aſſiſe having pleaded a releaſe by the plaintiff ſince the laſt continuance, to which the plaintiff replied *core tenus*, as the manner then was) that he was out of his mind when he gave it, the court adjourned the aſſiſe; doubting, whether as the plaintiff was ſane both then and at the commencement of the ſuit, he ſhould be permitted to plead an intermediate deprivation of reaſon; and the queſtion was aſked how he came to

(t) Co. Litt. 42.
(u) *Ibid.* 2.
(w) *Ibid.* 247.
(x) Britton, c. 28. *fol.* 66.
(y) *fol.* 228.
(z) 5 *Edw. III.* 70.

remember the releaſe, if out of his ſenſes when he gave it (a). Under Henry VI. this way of reaſoning (that a man ſhall not be allowed to diſable himſelf, by pleading his own incapacity, becauſe he cannot know what he did under ſuch a ſituation) was ſeriouſly adopted by the judges in argument (b); upon a queſtion, whether the heir was barred of his right of entry by the feoffment of his inſane anceſtor. And from theſe looſe authorities, which Fitzherbert does not ſcruple to reject as being contrary to reaſon (c), the maxim that a man ſhall not ſtultify himſelf hath been handed down as a ſettled law (d): though later opinions, feeling the inconvenience of the rule, have in many points endeavoured to reſtrain it (e). And, clearly, the next heir, or other perſon intereſted, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant (f). And ſo too, if he purchaſes under this diſability, and does not afterwards upon recovering his ſenſes agree to the purchaſe, his heir may either waive or accept the eſtate at his option (g). In like manner, an infant may waive ſuch purchaſe or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him (h). Perſons alſo, who purchaſe or convey under dureſs, may affirm or avoid ſuch tranſaction, whenever the dureſs is ceaſed (i). For all theſe are under the protection of the law; which will not ſuffer them to be impoſed upon, through the imbecillity of their preſent condition; ſo that their acts are only binding, in caſe they be afterwards agreed to, when ſuch imbecillity ceaſes.

THE caſe of a feme-covert is ſomewhat different. She may *purchaſe* an eſtate without the conſent of her huſband, and the conveyance is good during the coverture, till he avoids it by ſome act declaring his diſſent (k). And, tho' he does nothing

(a) 35 *Aſſiſ.* pl. 10.
(b) 39 *Hen. VI.* 42.
(c) F. N. B. 202.
(d) Litt. §. 405. Cro. Eliz. 398. 4 Rep. 123.
(e) Comb. 469. 3 Mod. 310, 311. 1 Equ. caſ. abr. 279.
(f) Perkins. §. 21.
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(k) Co. Litt. 3.

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THE caſe of an alien born is alſo peculiar. For he may purchaſe any thing; but after purchaſe he can *hold* nothing, except a leaſe for years of a houſe for convenience of merchandize, in caſe he be an alien-friend: all other purchaſes (when found by an inqueſt of office) being immediately forfeited to the king (n).

PAPISTS, laſtly, and perſons profeſſing the popiſh religion, are by ſtatute 11 & 12 W. III. c. 4. diſabled to purchaſe any lands, rents, or hereditaments; and all eſtates made to their uſe, or in truſt for them, are void. But this ſtatute is conſtrued to extend only to papiſts above the age of eighteen; ſuch only being abſolutely diſabled to purchaſe: yet the next proteſtant heir of a papiſt under eighteen ſhall have the profits, during his life; unleſs he renounces his errors within the time limited by law (o).

II. WE are next, but principally, to enquire, *how* a man may aliene or convey; which will lead us to conſider the ſeveral modes of conveyance.

IN conſequence of the admiſſion of property, or the giving a ſeparate right by the law of ſociety to thoſe things which by the law of nature were in common, there were neceſſarily ſome means to be deviſed, whereby that ſeparate right or excluſive property ſhould be originally acquired; which, we have more than once obſerved, was that of oc-

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(m) Perkins. §. 154. 1 Sid. 120.
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(o) 1 P. Wms. 354.

cupancy

cupancy or firſt poſſeſſion. But this poſſeſſion, when once gained, was alſo neceſſarily to be continued; or elſe, upon one man's dereliction of the thing he had ſeiſed, it would again become common, and all thoſe miſchiefs and contentions would enſue, which property was introduced to prevent. For this purpoſe therefore, of continuing the poſſeſſion, the municipal law has eſtabliſhed *deſcents* and *alienations*: the former to continue the poſſeſſion in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in thoſe perſons, to whom the proprietor, by his own *voluntary* act, ſhall chooſe to relinquiſh it in his life time. A tranſlation, or transfer, of property being thus admitted by law, it became neceſſary that this transfer ſhould be properly evidenced: in order to prevent diſputes, either about the fact, as whether there was any transfer at all; or concerning the perſons, by whom and to whom it was transferred; or with regard to the ſubject matter, as what the thing transferred conſiſted of; or, laſtly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what eſtate and intereſt) the conveyance was made. The legal evidences of this tranſlation of property are called the *common aſſurances* of the kingdom; whereby every man's eſtate is aſſured to him, and all controverſies, doubts and difficulties are either prevented or removed.

THESE common aſſurances are of four kinds: 1. By matter *in pais*, or deed; which is an aſſurance tranſacted between two or more private perſons *in pais*, in the country; that is (according to the old common law) upon the very ſpot to be transferred. 2. By matter of *record*, or an aſſurance tranſacted only in the king's public courts of record. 3. By ſpecial *cuſtom*, obtaining in ſome particular places, and relating only to ſome particular ſpecies of property. Which three are ſuch as take effect during the life of the party conveying or aſſuring. 4. The fourth takes no effect, till after his death; and that is by *deviſe*, contained in his laſt will and teſtament. We ſhall treat of each in its order.

CHAPTER

CHAPTER THE TWENTIETH.

OF ALIENATION BY DEED.

IN treating of deeds I ſhall conſider, firſt, their general nature; and, next, the ſeveral ſorts or kinds of deeds, with their reſpective incidents. And in explaining the former, I ſhall examine, firſt, what a deed is; ſecondly, its requiſites; and, thirdly, how it may be avoided.

I. FIRST then, a deed is a writing ſealed and delivered by the parties (a). It is ſometimes called a charter, *carta* from its materials; but moſt uſually, when applied to the tranſactions of private ſubjects, it is called a deed, in Latin *factum*, κατ' ἐξοχήν, becauſe it is the moſt ſolemn and authentic act that a man can poſſibly perform, with relation to the diſpoſal of his property; and therefore a man ſhall always be *eſtopped* by his own deed, or not permitted to aver or prove any thing in contradiction to what he has once ſo ſolemnly and deliberately avowed (b). If a deed be made by more parties than one, there ought to be regularly as many copies of it as there were parties, and each ſhould be cut or indented (formerly in acute angles *inſtar dentium*; but at preſent in a waving line) on the top or ſide, to tally or correſpond with the other; which deed ſo made, is called an indenture. Formerly, when deeds were more conciſe than at preſent, it was uſual to write both parts on the ſame piece of parchment, with ſome word or letters of the alphabet written between them; through which the parchment was cut, either in a ſtrait or indented line, in ſuch a manner as to

(a) Co. Litt. 171. (b) Plowd. 434.

leave half the word on one part and half on the other. Deeds thus made were denominated *ſyngrapha* by the canoniſts (c); and with us *chirographa*, or hand-writings (d); the word *cirographum* or *cyrographum* being uſually that which was divided in making the indenture: and this cuſtom is ſtill preſerved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into uſe, without cutting through any letters at all; and it ſeems at preſent to ſerve for little other purpoſe, than to give name to the ſpecies of the deed. When the ſeveral parts of an indenture are interchangeably executed by the ſeveral parties, that part or copy which is executed by the grantor is uſually called the *original*, and the reſt are *counterparts*: though of late it is moſt frequent for all the parties to execute every part; when renders them all originals. A deed made by one party only is not indented, but *polled* or ſhaved quite even; and is therefore called a *deed-poll*, or a ſingle deed (e).

II. WE are in the next place to conſider the *requiſites* of a deed. The firſt of which is, that there be perſons able to contract and be contracted with, for the purpoſes intended by the deed; and alſo a thing, or ſubject matter to be contracted for: all which muſt be expreſſed by ſufficient names (f). So as in every grant there muſt be a grantor, a grantee, and a thing granted; in every leaſe a leſſor, a leſſee, and a thing demiſed.

SECONDLY; the deed muſt be founded upon good and ſufficient *conſideration*. Not upon an uſurious contract (g); nor upon fraud or colluſion, either to deceive purchaſors *bona fide* (h), or juſt and lawful creditors (i); any of which bad conſiderations will vacate the deed. A deed alſo, or other grant, made without any conſideration, is, as it were, of no effect; for it is conſtrued to enure, or to be effectual, only to the uſe of the grantor himſelf (k). The conſide-

(c) Lyndew. *l.* 1. *t.* 10. *c.* 1.
(d) Mirror. c. 2. §. 27.
(e) *Ibid.* Litt. §. 371, 372.
(f) Co. Litt. 35.
(g) Stat. 13 Eliz. c. 8.
(h) Stat. 27. Eliz. c. 4.
(i) Stat. 13. Eliz. c. 5.
(k) Perk. §. 533.

ration

ration may be either a *good*, or a *valuable* one. A good conſideration is ſuch as that of blood, or of natural love and affection, when a man grants an eſtate to a near relation; being founded on motives of generoſity, prudence, and natural duty: or a valuable conſideration is ſuch as money, marriage, or the like, which the law eſteems an equivalent given for the grant (l); and is therefore founded in motives of juſtice. Deeds, made upon good conſideration only, are conſidered merely as voluntary, and are frequently ſet aſide in favour of creditors, and *bona fide* purchaſors.

THIRDLY; the deed muſt be *written*, or, I preſume, *printed*; for it may be in any character or any language; but it muſt be on paper, or parchment. For if it be written on ſtone, board, linen, leather, or the like, it is no deed (m). Wood or ſtone may be more durable, and linen leſs liable to raſures; but writing on paper or parchment unites in itſelf, more perfectly than any other way, both theſe deſireable qualities: for there is nothing elſe ſo durable, and at the ſame time ſo little liable to alteration; nothing ſo ſecure from alteration, that is at the ſame time ſo durable. It muſt alſo have the regular ſtamps, impoſed on it by the ſeveral ſtatutes for the increaſe of the public revenue; elſe it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the ſtatute 29 Car. II. c. 3. enacts, that no leaſe or eſtate in lands, tenements, or hereditaments, (except leaſes, not exceeding three years from the making, and whereon the reſerved rent is at leaſt two thirds of the real value) ſhall be looked on as of greater force than a leaſe or eſtate at will; unleſs put in writing, and ſigned by the party granting, or his agent lawfully authorized, in writing.

FOURTHLY; the matter written muſt be *legally* and *orderly* ſet forth: that is, there muſt be words ſufficient to ſpecify the agreement and bind the parties: which ſuffici-

(l) 3 Rep. 83. (m) Co. Litt. 229. F. N. B. 122.

ency

ency muſt be left to the courts of law to determine (n). For it is not abſolutely neceſſary in law, to have all the formal parts that are uſually drawn out in deeds, ſo as there be ſufficient words to declare clearly and legally the party's meaning. But, as theſe formal and orderly parts are calculated to convey that meaning in the cleareſt, diſtincteſt, and moſt effectual manner, and have been well conſidered and ſettled by the wiſdom of ſucceſſive ages, it is prudent not to depart from them without good reaſon or urgent neceſſity; and therefore I will here mention them in their uſual (o) order.

1. THE *premiſes* may be uſed to ſet forth the number and names of the parties, with their additions or titles. They alſo contain the recital, if any, of ſuch deeds, agreements, or matters of fact, as are neceſſary to explain the reaſons upon which the preſent tranſaction is founded: and herein alſo is ſet down the conſideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted (p).

2, 3. NEXT, come the *habendum* and *tenendum* (q). The office of the *habendum* is properly to determine what eſtate or intereſt is granted by the deed: though this may be performed, and ſometimes is performed, in the premiſes. In which caſe the *habendum* may leſſen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the eſtate granted in the premiſes. As if a grant be "to A and "the heirs of his body" in the premiſes, *habendum*, "to him "and his heirs for ever," or *vice verſa*; here A has an eſtate-tail, and a fee-ſimple expectant thereon (r). But had it been in the premiſes "to him and his heirs," *habendum*, "to him for life," the *habendum* would be utterly void (s); for an eſtate of inheritance is veſted in him before the *habendum* comes, and ſhall not afterwards be taken away, or deveſted by it. The *tenendum*, "and to "hold," is now of very little uſe, and is only kept in by cuſtom. It was ſometimes formerly uſed to ſignify

(n) Co Litt. 225.
(o) *Ibid.* 6.
(p) See appendix, N°. 2 §. 2. pag. v.
(q) *Ibid.*
(r) Co. Litt. 21. 2 Roll. Rep. 19. 23. Cro. Jac. 476.
(s) 2 Rep. 23. 8 Rep. 56.

the

the tenure, by which the eſtate granted was to be holden; viz. "*tenendum per ſervitium militare, in burgagio, in libero ſocagio, &c.*" But, all theſe being now reduced to free and common ſocage, the tenure is never ſpecified. Before the ſtatute of *quia emptores*, 18 Edw. I. it was alſo ſometimes uſed to denote the lord of whom the land ſhould be holden; but that ſtatute directing all future purchaſers to hold, not of the immediate grantor, but of the chief lord of the fee, this uſe of the *tenendum* hath alſo been antiquated; though for a long time after we find it mentioned in antient charters, that the tenements ſhall be holden *de capitalibus dominis feodi* (t): but, as this expreſſed nothing more than the ſtatute had already provided for, it gradually grew out of uſe.

4. NEXT follow the terms or ſtipulations, if any, upon which the grant is made: the firſt of which is the *reddendum* or reſervation, whereby the grantor doth create or reſerve ſome new thing to himſelf out of what he had before granted. As "rendering therefore yearly the ſum of "ten ſhillings, or a pepper-corn, or two days ploughing, "or the like (u)." This render, *reditus*, return, or rent, under the pure feodal ſyſtem, conſiſted in chivalry, principally of military ſervices; in villenage, of the moſt ſlaviſh offices; and, in ſocage, it uſually conſiſts of money, though it may conſiſt of ſervices ſtill, or of any other certain profit (w). To make a *reddendum* good, if it be of any thing newly created by the deed, the reſervation muſt be to the grantors, or ſome, or one of them, and not to any ſtranger to the deed (x). But if it be of antient ſervices or the like, annexed to the land, then the reſervation may be to the lord of the fee (y).

5. ANOTHER of the terms upon which a grant may be made, is a *condition*; which is a clauſe of contingency, on the happening of which the eſtate granted may be defeated; as "provided always, that if the mortgagor ſhall pay the

(t) Append. No. I. Madox. *Formul. paſſim.*
(u) Append. No. II. §. 1. pag. iii.
(w) See pag. 41.
(x) Plowd. 13. 8 Rep. 71.
(y) Append. No. I. p. i.

"mortgagee

" mortgagee 500 *l.* upon ſuch a day, the whole eſtate gran-
" ted ſhall determine;" and the like (z).

6. NEXT may follow the clauſe of *warranty*, whereby the grantor doth, for himſelf and his heirs, warrant and ſecure to the grantee the eſtate ſo granted (a). By the feodal conſtitution, if the vaſal's title to enjoy the fee was diſputed, he might vouch, or call, the lord or donor to warrant or inſure his gift; which if he failed to do, and the vaſal was evicted, the lord was bound to give him another feud of equal value in recompenſe (b). And ſo, by our antient law, if before the ſtatute of *quia emptores* a man enfeoffed another in fee, by the feodal verb *dedi*, to hold of himſelf and his heirs by certain ſervices; the law annexed a warrant to this grant, which bound the feoffor and his heirs, to whom the ſervices (which were the conſideration and equivalent for the gift) were originally ſtipulated to be rendered (c). Or if a man and his anceſtors had immemorially holden land of another and his anceſtors by the ſervice of homage (which was called *homage auncеſtrel*) this alſo bound the lord to warranty (d); the homage being an evidence of ſuch a feodal grant. And, upon a ſimilar principle, in caſe, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his ſhare, the other and his heirs are bound to warranty (e), becauſe they enjoy the equivalent. and ſo, even at this day, upon a gift in tail or leaſe for life, rendering rent, the donor or leſſor and his heirs (to whom the rent is payable) are bound to warrant the title (f). But in a feoffment in fee by the verb *dedi*, ſince the ſtatute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs (g); becauſe it is a mere perſonal contract on the part of the feoffor, the tenure (and of courſe the antient ſervices) reſulting back to the ſuperior lord of the fee. And in other forms of alienation, gradu-

(z) Append. N°. II. §. 2. pag. viii.
(a) *Ibid.* N°. I. p. i.
(b) *Feud. l.* 2. *t.* 8, & 25.
(c) Co. Litt. 384.
(d) Litt. §. 143.
(e) Co. Litt. 174.
(f) *Ibid.* 384.
(g) *Ibid.*

ally

ally introduced ſince that ſtatute, no warranty whatſoever is implied (h); they bearing no ſort of analogy to the original feodal donation. And therefore in ſuch caſes it became neceſſary to add an expreſs clauſe of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo*, or *warrant* (i).

THESE expreſs warranties were introduced, even prior to the ſtatute of *quia emptores*, in order to evade the ſtrictneſs of the feodal doctrine of non-alienation without the conſent of the heir. For, though he, at the death of his anceſtor, might have entered on any tenements that were aliened without his concurrence, yet, if a clauſe of warranty was added to the anceſtor's grant, this covenant deſcending upon the heir inſured the grantee; not ſo much by confirming his title, as by obliging ſuch heir to yield him a recompenſe in lands of equal value: the law, in favour of alienations, ſuppoſing that no anceſtor would wantonly diſinherit his next of blood (k); and therefore preſuming that he had received a valuable conſideration, either in land, or in money which had purchaſed land, and that this equivalent deſcended to the heir together with the anceſtor's warranty. So that when either an anceſtor, being the rightful tenant of the freehold, conveyed the land to a ſtranger and his heirs, or releaſed the right in fee-ſimple to one who was already in poſſeſſion, and ſuperadded a warranty to his deed, it was held that ſuch warranty not only bound the warrantor himſelf to protect and aſſure the title of the warrantee, but it alſo bound his heir: and this, whether that warranty was *lineal* or *collateral* to the title of the land. *Lineal* warranty was where the heir derived, or might by poſſibility have derived, his title to the land warranted, either from or thro' the anceſtor who made the warranty; as, where a father, or an elder ſon in the life of a father, releaſed to the diſſeiſor of either themſelves or the grandfather, with warranty, this was lineal to the younger ſon (l). *Collateral* warranty was where the heir's title to the land neither was nor could

(h) Co. Litt. 102.
(i) Litt. §. 733.
(k) Co. Litt. 373.
(l) Litt. §. 703. 706. 707.

have

have been, derived from the warranting anceſtor; as, where a younger brother releaſed to his father's diſſeiſor, with warranty, this was collateral to the elder brother (m). But where the very conveyance, to which the warranty was annexed, immediately followed a diſſeiſin, or operated itſelf as ſuch (as, where a father, tenant for years, with remainder to his ſon in fee, aliened in fee-ſimple with warranty) this being in its original manifeſtly founded on the *tort* or wrong of the warrantor himſelf, was called a warranty *commencing by diſſeiſin*; and, being too palpably injurious to be ſupported, was not binding upon any heir of ſuch tortious warrantor (n).

In both lineal and collateral warranty, the obligation of the heir (in caſe the warrantee was evicted, to yield him other lands in their ſtead) was only on condition that he had other ſufficient lands by deſcent from the warranting anceſtor (o). But though, without aſſets, he was not bound to inſure the title of *another*, yet, in caſe of lineal warranty, whether aſſets deſcended or not, the heir was perpetually barred from claiming the land *himſelf*; for, if he could ſucceed in ſuch claim, he would then gain aſſets by deſcent (if he had them not before) and muſt fulfil the warranty of his anceſtor: and the ſame rule (p) was with leſs juſtice adopted alſo in reſpect of collateral warranties, which likewiſe (though no aſſets deſcended) barred the heir of the warrantor from claiming the land by any collateral title; upon the preſumption of law that he might hereafter have aſſets by deſcent either from or through the ſame anceſtor. The inconvenience of this latter branch of the rule was felt very early, when tenants by the curteſy took upon them to alienе their lands with warranty; which collateral warranty of the father deſcending upon his ſon (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the ſtatute of Gloceſter, 6 Edw. I. c. 3. declared, that ſuch warranty ſhould be no bar to the ſon, unleſs aſſets deſcended from the father. It

(m) Litt. §. 705. 707.
(n) Litt. §. 698. 702.
(o) Co. Litt. 102.
(p) Litt. §. 711. 712.

was

was afterwards attempted in 50 Edw. III. to make the ſame proviſion univerſal, by enacting that no collateral warranty ſhould be a bar, unleſs where aſſets deſcended from the ſame anceſtor (q); but it then proceeded not to effect. However, by the ſtatute 11 Henry VI. c. 2. notwithſtanding any alienation with warranty by tenant in dower, the heir of the huſband is not barred, though he be alſo heir to the wife. And by ſtatute 4 & 5 Ann. c. 16. all warranties by any tenant for life ſhall be void againſt thoſe in remainder or reverſion; and all collateral warranties by any anceſtor who has no eſtate of inheritance in poſſeſſion ſhall be void againſt his heir. By the wording of which laſt ſtatute it ſhould ſeem, that the legiſlature meant to allow, that the collateral warranty of tenant in tail, deſcending (though without aſſets) upon a remainder-man or reverſioner, ſhould ſtill bar the remainder or reverſion. For though the judges, in expounding the ſtatute *de donis*, held that, by analogy to the ſtatute of Gloceſter, a lineal warranty by the tenant in tail without aſſets would not bar the iſſue in tail, yet they held ſuch warranty with aſſets to be a ſufficient bar (r): which was therefore formerly mentioned (s) as one of the ways whereby an eſtate-tail might be deſtroyed; it being indeed nothing more in effect, than exchanging the lands entailed for others of equal value. They alſo held that collateral warranty was not within the ſtatute *de donis*; as that act was principally intended to prevent the tenant in tail from diſinheriting his own iſſue: and therefore collateral warranty (though without aſſets) was allowed to be, as at common law, a ſufficient bar of the eſtate-tail and all remainders and reverſions expectant thereon (t). And ſo it ſtill continues to be, notwithſtanding the ſtatute of queen Anne, if made by tenant in tail in poſſeſſion: who therefore may now without the forms of a fine or recovery, in ſome caſes make a good conveyance in fee-ſimple, by ſuperadding a warranty to his grant; which, if accompanied with aſſets, bars his own iſſue, and without them bars ſuch of his heirs as may be in remainder or reverſion.

(q) Co. Litt. 373.
(r) Litt. §. 712. 2 Inſt. 293.
(s) pag. 116.
(t) Co. Litt. 374. 2 Inſt. 335.

7. AFTER

7. AFTER warranty uſually follow *covenants*, or conventions; which are clauſes of agreement contained in a deed, whereby either party may ſtipulate for the truth of certain facts, or may bind himſelf to perform, or give, ſomething to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like: the grantee may covenant to pay his rent, to repair the premiſes, *&c.* (u). If the covenantor covenants for himſelf and his *heirs*, it is then a covenant real, and deſcends upon the heirs; who are bound to perform it, provided they have aſſets by deſcent, but not otherwiſe: if he covenants alſo for his *executors* and *adminiſtrators*, his perſonal aſſets, as well as his real, are likewiſe pledged for the performance of the covenant; which makes ſuch covenant a better ſecurity than any warranty, and it has therefore in modern practice totally ſuperſeded the other.

8. LASTLY, comes the *concluſion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expreſsly, or by reference to ſome day and year before-mentioned (w). Not but a deed is good, although it mention no date; or hath a falſe date; or even if it hath an impoſſible date, as the thirtieth of February; provided the real day of its being dated or given, that is, delivered, can be proved (x).

I PROCEED now to the *fifth* requiſite for making a good deed; the *reading* of it. This is neceſſary, where-ever any of the parties deſire it; and, if it be not done on his requeſt, the deed is void as to him. If he can, he ſhould read it himſelf: if he be blind or illiterate, another muſt read it to him. If it be read falſely, it will be void; at leaſt for ſo much as is miſ-recited: unleſs it be agreed by colluſion that the deed ſhall be read falſe, on purpoſe to make it void; for in ſuch caſe it ſhall bind the fraudulent party (y).

(u) Append. N°. II. §. 2. pag. viii.
(w) *Ibid.* pag. xii.
(x) Co. Litt. 46. Dyer. 28.
(y) 2 Rep. 3. 9. 11 Rep. 27.

SIXTHLY,

SIXTHLY, it is requiſite that the party, whoſe deed it is, ſhould *ſeal*, and in moſt caſes I apprehend ſhould *ſign* it alſo. The uſe of ſeals, as a mark of authenticity to letters and other inſtruments in writing, is extremely antient. We read of it among the Jews and Perſians in the earlieſt and moſt ſacred records of hiſtory (z). And in the book of Jeremiah there is a very remarkable inſtance, not only of an atteſtation by ſeal, but alſo of the other uſual formalities attending a Jewiſh purchaſe (a). In the civil law alſo (b), ſeals were the evidence of truth; and were required, on the part of the witneſſes at leaſt, at the atteſtation of every teſtament. But in the times of our Saxon anceſtors, they were not much in uſe here. For though ſir Edward Coke (c) relies on an inſtance of king Edwyn's making uſe of a ſeal about an hundred years before the conqueſt, yet it does not follow that this was the uſage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumſtance, of being ſealed; ſince we are aſſured by all our ancient hiſtorians, that ſealing was not then in common uſe. The method of the Saxons was for ſuch as could write to ſubſcribe their names, and, whether they could write or not, to affix the ſign of the croſs: which cuſtom our illiterate vulgar do, for the moſt part, to this day keep up; by ſigning a croſs for their mark, when unable to write their names. And indeed this inability to write, and therefore making a croſs in its ſtead, is honeſtly avowed by Caedwolla, a Saxon king, at the end of one of his charters (d). In like manner, and for the ſame unſurmountable reaſon, the Normans, a brave but illiterate

(z) 1 Kings. c. 21. Daniel. c. 6. Eſther. c. 8.

(a) "And I bought the field of "Hanameel, and weighed him the mo-"ney, even ſeventeen ſhekels of ſil-"ver. And I ſubſcribed the evidence, "and ſealed it, and took witneſſes, and "weighed him the money in the bal-"lances. And I took the evidence of "the purchaſe, both that which was "ſealed according to the law and cuſ-"tom, and alſo that which was open." c. 32.

(b) *Inſt.* 2. 10. 2 & 3.

(c) 1 Inſt. 7.

(d) "*Propria manu pro ignorantia* "*literarum ſignum ſanctae crucis ex-*"*preſſi et ſubſcripſi.*" Seld. *Jan Aug. l.* 1. §. 42. And this (according to Procopius) the emperor Juſtin in the eaſt, and Theodoric king of the Goths in Italy, had before authoriſed by their example, on account of their inability to write.

nation, at their firſt ſettlement in France, uſed the practice of ſealing only, without writing their names: which cuſtom continued, when learning made its way among them, though the reaſon for doing it had ceaſed; and hence the charter of Edward the Confeſſor to Weſtminſter abbey, himſelf being brought up in Normandy, was witneſſed only by his ſeal, and is generally thought to be the oldeſt ſealed charter of any authenticity in England (e). At the conqueſt, the Norman lords brought over into this kingdom their own faſhions; and introduced waxen ſeals only, inſtead of the Engliſh method of writing their names, and ſigning with the ſign of the croſs (f). The impreſſions of theſe ſeals were ſometimes a knight on horſeback, ſometimes other deviſes: but coats of arms were not introduced into ſeals, nor indeed into any other uſe, till about the reign of Richard the firſt, who brought them from the croiſade in the holy land; where they were firſt invented and painted on the ſhields of the knights, to diſtinguiſh the variety of perſons of every chriſtian nation who reſorted thither, and who could not, when clad in complete ſteel, be otherwiſe known or aſcertained.

THIS neglect of ſigning, and reſting only upon the authenticity of ſeals, remained very long among us; for it was held in all our books that ſealing alone was ſufficient to authenticate a deed: and ſo the common form of atteſting deeds, —— "*ſealed* and delivered," continues to this day; notwithſtanding the ſtatute 29 Car. II. c. 3. before-mentioned revives the Saxon cuſtom, and expreſsly directs the ſigning, in all grants of lands, and many other ſpecies of deeds; in which therefore ſigning ſeems to be now as neceſſary as ſealing, though it hath been ſometimes held, that the one includes the other (g).

A SEVENTH requiſite to a good deed is that it be *delivered*, by the party himſelf or his certain attorney: which there-

(e) Lamb. *Archeion.* 51.

(f) "*Normanni chirographorum confectionem, cum crucibus aureis, aliiſque ſignaculis ſacris, in Anglia firmari ſolitam, in cæram impreſſam mutant, modumque ſcribendi Anglicum rejiciunt.*" Ingulph.

(g) 3 Lev. 2. Stra. 764.

fore

fore is alſo expreſſed in the atteſtation; "ſealed and *deliver-*
"*ed.*" A deed takes effect only from this tradition or delivery; for, if the date be falſe or impoſſible, the delivery aſcertains the time of it. And if another perſon ſeals the deed, yet if the party delivers it himſelf, he thereby adopts the ſealing (h), and by a parity of reaſon the ſigning alſo, and makes them both his own. A delivery may be either abſolute, that is, to the party or grantee himſelf; or to a third perſon, to hold till ſome conditions be performed on the part of the grantee: in which laſt caſe it is not delivered as a *deed*, but as an *eſcrow*; that is, as a ſcrowl or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purpoſes (i).

THE *laſt* requiſite to the validity of a deed is the *atteſtation*, or execution of it *in the preſence of witneſſes:* though this is neceſſary, rather for preſerving the evidence, than for conſtituting the eſſence, of the deed. Our modern deeds are in reality nothing more than an improvement or amplification of the *brevia teſtata* mentioned by the feodal writers (k); which were written memorandums, introduced to perpetuate the tenor of the conveyance and inveſtiture, when grants by parol only became the foundation of frequent diſpute and uncertainty. To this end they regiſtered the deed the perſons who attended as witneſſes, which was formerly done without their ſigning their names (that not being always in their power) but they only heard the deed read; and then the clerk or ſcribe added their names, in a ſort of memorandum; thus, "*hijs teſtibus, Johanne* "*Moore, Jacobo Smith, et aliis ad hanc rem convocatis* (l)." This, like all other ſolemn tranſactions, was originally done only *coram paribus* (m), and frequently when aſſembled in the court baron, hundred, or county court; which was then expreſſed in the atteſtation, *teſte comitatu, hundredo, &c.* (n). Afterwards the atteſtation of other witneſſes was allowed, the trial in caſe of a diſpute being ſtill re-

(h) Perk. §. 130.
(i) Co. Litt. 36.
(k) *Feudal. l.* 1. *t.* 4.
(l) Co. Litt. 7.
(m) *Feud l.* 2. *t.* 32.
(n) Spelm. *Gloſſ.* 228. Madox. *Formul.* nº. 221. 322. 660.

ſerved to the *pares*; with whom the witneſſes (if more than one) were aſſociated, and joined in the verdict (o): till that alſo was abrogated by the ſtatute of York, 12 Edw. II. ſt. 1. c. 2. And in this manner, with ſome ſuch clauſe of *hijs teſtibus*, are all old deeds and charters, particularly *magna charta*, witneſſed. And, in the time of ſir Edward Coke, creations of nobility were ſtill witneſſed in the ſame manner (p). But in the king's common charters, writs, or letters patent, the ſtile is now altered: for, at preſent, the king is his own witneſs, and atteſts his letters patent thus; "*teſte meipſo*, witneſs ourſelf at Weſtminſter, *&c.*" a form which was introduced by Richard the firſt (q), but not commonly uſed till about the beginning of the fifteenth century; nor the clauſe of *hijs teſtibus* intirely diſcontinued till the reign of Henry the eighth (r): which was alſo the æra of diſcontinuing it in the deeds of ſubjects, learning being then revived, and the faculty of writing more general: and therefore ever ſince that time the witneſſes have ſubſcribed their atteſtation, either at the bottom, or on the back, of the deed (s).

III. WE are next to conſider, how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the eſſential requiſites before-mentioned; either, 1. Proper parties, and a proper ſubject matter: 2. A good and ſufficient conſideration: 3. Writing, on paper or parchment, duly ſtamped: 4. Sufficient and legal words, properly diſpoſed: 5. Reading, if deſired, before the execution: 6. Sealing; and, by the ſtatute, in many caſes ſigning alſo: or, 7. Delivery: it is a void deed *ab initio*. It may alſo be avoided by matter *ex poſt facto*: as, 1. By raſure, interlining, or other alteration in any material part; unleſs a memorandum be made thereof at the time of the execution and atteſtation (t). 2. By breaking off, or defacing the ſeal (u). 3. By

(o) Co. Litt. 6.
(p) 2 Inſt. 77.
(q) Madox. *Formul.* nº. 515.
(r) *Ibid.* Diſſert. fol. 32.
(s) 2 Inſt. 78.
(t) 11 Rep. 27.
(u) 5 Rep. 23.

delivering

delivering it up to be cancelled; that is to have lines drawn over it, in the form of lattice work or *cancelli*; though the phraſe is now uſed figuratively for any manner of obliteration or defacing it. 4. By the diſagreement of ſuch, whoſe concurrence is neceſſary, in order for the deed to ſtand: as, the huſband, where a feme covert is concerned; an infant, or perſon under dureſs, when thoſe diſabilities are removed; and the like. 6. By the judgment or decree of a court of judicature. This was antiently the province of the court of ſtar chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an abſolute forgery (w). In any of theſe caſes the deed may be voided, either in part or totally, according as the cauſe of avoidance is more or leſs extenſive.

AND, having thus explained the general nature of deeds, we are next to conſider their ſeveral ſpecies, together with their reſpective incidents. And herein I ſhall only examine the particulars of thoſe, which, from long practice and experience of their efficacy, are generally uſed in the alienation of *real* eſtates: for it would be tedious, nay infinite, to deſcant upon all the ſeveral inſtruments made uſe of in *perſonal* concerns, but which fall under our general definition of a deed; that is, a writing ſealed and delivered. The former, being principally ſuch as ſerve to *convey* the property of lands and tenements from man to man, are commonly denominated *conveyances:* which are either conveyances at *common law*, or ſuch as receive their force and efficacy by virtue of the *ſtatute of uſes*.

I. OF conveyances by the common law ſome may be called *original*, or *primary* conveyances; which are thoſe by means whereof the benefit or eſtate is created or firſt ariſes: others are derivative or ſecondary; whereby the benefit or eſtate, originally created, is enlarged, reſtrained, transferred, or extinguiſhed.

(w) Toth. N°. 24. 1 Vern. 348.

ORIGINAL conveyances are the following; 1. Feoffment; 2. Gift; 3. Grant; 4. Leaſe; 5. Exchange; 6. Partition: *derivative* are, 7. Releaſe; 8. Confirmation; 9. Surrender; 10. Aſſignment; 11. Defeazance.

1. A FEOFFMENT, *feoffamentum*, is a ſubſtantive derived from the verb, to enfeoff, *feoffare* or *infeudare*, to give one a feud; and therefore feoffment is properly *donatio feudi*, (x). It is the moſt antient method of conveyance, the moſt ſolemn and public, and therefore the moſt eaſily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that ſo gives, or enfeoffs, is called the *feoffor*; and the perſon enfeoffed is denominated the *feoffee*.

THIS is plainly derived from, or is indeed itſelf the very mode of the antient feodal donation; for though it may be performed by the word "enfeoff" or "grant," yet the apteſt word of feoffment is "*do* or *dedi* (y)." And it is ſtill directed and governed by the ſame feodal rules; inſomuch that the principal rule relating to the extent and effect of a feodal grant, "*tenor eſt qui legem dat feudo*," is in other words become the maxim of our law with relation to feoffments, "*modus legem dat donationi* (z)." And therefore as in pure feodal donations the lord, from whom the feud moved, muſt expreſsly limit and declare the continuance or quantity of eſtate he meant to confer, "*ne quis plus donaſſe præſumatur, quam in donatione expreſſerit* (a);" ſo, if one grants by feoffment lands or tenements to another, and limits or expreſſes no eſtate, the grantee (due ceremonies of law being performed) hath barely an eſtate for life (b). For, as the perſonal abilities of the feoffee were originally preſumed to be the immediate or principal inducements to the feoffment, the feoffee's eſtate ought to be confined to his perſon, and ſubſiſt only for his life; un-

(x) Co. Litt. 9.
(y) *Ibid.*
(z) Wright. 21.
(a) pag. 108.
(b) Co. Litt. 42.

leſs

leſs the feoffor, by expreſs proviſion in the creation and conſtitution of the eſtate, hath given it a long continuance. Theſe expreſs proviſions are indeed generally made; for this was for ages the only conveyance, whereby our anceſtors were wont to create an eſtate in fee-ſimple (c), by giving the land to the feoffee, to hold to him and his heirs for ever; though it ſerves equally well to convey any other eſtate of freehold (d).

BUT by the mere words of the deed the feoffment is by no means perfected. There remains a very material ceremony to be performed, called *livery of ſeiſin*; without which the feoffee has but a mere eſtate at will (e). This livery of ſeiſin is no other than the pure feodal inveſtiture, or delivery of corporal poſſeſſion of the land or tenement; which was held abſolutely neceſſary to complete the donation. "*Nam feudum ſine inveſtitura nullo modo* "*conſtitui potuit* (f);" and an eſtate was then only perfect, when as Fleta expreſſes it in our law, "*ſit juris et ſeiſinae* "*conjunctio*, (g)."

INVESTITURES, in their original riſe, were probably intended to demonſtrate in conquered countries the actual poſſeſſion of the *lord*; and that he did not grant a bare litigious right, which the ſoldier was ill qualified to proſecute, but a peaceable and firm poſſeſſion. And, at a time when writing was ſeldom practiſed, a mere oral gift, at a diſtance from the ſpot that was given, was not likely to be either long or accurately retained in the memory of byſtanders, who were very little intereſted in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and teſtify the transfer of the eſtate; and that ſuch as claimed title by other means might know againſt whom to bring their actions.

IN all well-governed nations, ſome notoriety of this kind has been ever held requiſite, in order to acquire and aſcer-

(c) See Appendix. No. I.
(d) Co. Litt. 9.
(e) Litt. §. 66.
(f) Wright. 37.
(g) *l.* 3. *c.* 15. §. 5.

tain the property of lands. In the Roman law *plenum dominium* was not ſaid to ſubſiſt, unleſs where a man hath both the *right*, and the *corporal poſſeſſion*; which poſſeſſion could not be acquired without both an actual intention to poſſeſs, and an actual ſeiſin, or entry into the premiſes, or part of them in the name of the whole (h). And even in eccleſiaſtical promotions, where the freehold paſſes to the perſon promoted, corporal poſſeſſion is required at this day, to veſt the property completely in the new proprietor; who, according to the diſtinction of the canoniſts (i), acquires the *jus ad rem*, or inchoate and imperfect right, by nomination and inſtitution; but not the *jus in re*, or complete and full right, unleſs by corporal poſſeſſion. Therefore in dignities poſſeſſion is given by inſtallment; in rectories and vicarages by induction, without which no temporal rights accrue to the miniſter, though every eccleſiaſtical power is veſted in him by inſtitution. So alſo even in deſcents of lands, by our law, which are caſt on the heir by act of the law itſelf, the heir has not *plenum dominium* or full and complete ownerſhip, till he has made an actual corporal entry into the lands: for if he dies before *entry* made, *his* heir ſhall not be intitled to take the poſſeſſion, but the heir of the perſon who was laſt actually ſeized (k). It is not therefore only a mere right to enter, but the actual entry, that makes a man complete owner; ſo as to tranſmit the inheritance to his own heirs: *non jus, ſed ſeiſina, facit ſtipitem* (l).

YET, the corporal tradition of lands being ſometimes inconvenient, a ſymbolical delivery of poſſeſſion was in many caſes antiently allowed; by transferring ſomething near at hand, in the preſence of credible witneſſes, which by agreement ſhould ſerve to repreſent the very thing deſigned to

(h) *Nam apiſcimur poſſeſſionem corpore et animo; neque, per ſe animo. Non autem ita a capiendum eſt, ut qui fundum poſſidere velit, omnes glebas circumambulet; ſed ſufficit quamlibet partem ejus fundi introire.* (*Ff.* 41. 2. 3.) And again: *traditionibus dominia rerum, non nudis pactis, transferuntur.* (Cod. 2. 3. 20.)

(i) Decretal. *l.* 3. *t.* 4. *c.* 40.

(k) See page 209, 227, 228.

(l) Flet. *l.* 6. *c.* 2. §. 2.

be

be conveyed; and an occupancy of this ſign or ſymbol was permitted as equivalent to occupancy of the land itſelf. Among the Jews we find the evidence of a purchaſe thus defined in the book of Ruth (m): "Now this was the manner in former time in Iſrael, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his ſhoe, and gave it to his neighbour; and this was a teſtimony in Iſrael." Among the antient Goths and Swedes, contracts for the ſale of lands were made in the preſence of witneſſes, who extended the cloak of the buyer, while the ſeller caſt a clod of the land into it, in order to give poſſeſſion: and a ſtaff or wand was alſo delivered from the vendor to the vendee, which paſſed through the hands of the witneſſes (n). With our Saxon anceſtors the delivery of a turf was a neceſſary ſolemnity, to eſtabliſh the conveyance of lands (o). And, to this day, the conveyance of our copyhold eſtates is uſually made from the ſeller to the lord or his ſteward by delivery of a rod or virge, and then from the lord to the purchaſer by re-delivery of the ſame, in the preſence of a jury of tenants.

CONVEYANCES in writing were the laſt and moſt refined improvement. The mere delivery of poſſeſſion, either actual or ſymbolical, depending on the ocular teſtimony and remembrance of the witneſſes, was liable to be forgotten or miſrepreſented, and became frequently incapable of proof. Beſides, the new occaſions and neceſſities, introduced by the advancement of commerce, required means to be deviſed of charging and incumbering eſtates, and of making them liable to a multitude of conditions and minute deſignations for the purpoſes of raiſing money, without an abſolute ſale of the land, and ſometimes the like proceedings were found uſeful in order to make a decent and competent proviſion for the numerous branches of a family, and for other domeſtic views. None of which could be effected by a mere, ſimple, corporal transfer of the ſoil from one man to another, which was principally calculated for conveying an abſolute unlimited dominion.

(m) ch. 4. v. 7.
(n) Stiernhook. *de jure Sueon. l.* 2. *c.* 4.
(o) Hickes. *Diſſert. epiſtolar.* 85.

Written

Written deeds were therefore introduced, in order to ſpecify and perpetuate the peculiar purpoſes of the party who conveyed: yet ſtill, for a very long ſeries of years, they were never made uſe of, but in company with the more antient and notorious method of transfer, by delivery of corporal poſſeſſion.

LIVERY of ſeiſin, by the common law, is neceſſary to be made upon every grant of an eſtate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impoſſible to be made; for they are not the object of the ſenſes: and in leaſes for years, or other chattel intereſts, it is not neceſſary. In leaſes for years indeed an actual *entry* is neceſſary, to veſt the eſtate in the leſſee: for the bare leaſe gives him only a right to enter, which is called his intereſt in the term, or *intereſſe termini*; and, when he enters in purſuance of that right, he is then and not before in poſſeſſion of his term, and complete tenant for years (p). This entry by the tenant himſelf ſerves the purpoſe of notoriety, as well as livery of ſeiſin from the grantor could have done; which it would have been improper to have given in this caſe, becauſe that ſolemnity is appropriated to the conveyance of a freehold. And this is one reaſon why freeholds cannot be made to commence *in futuro*, becauſe they cannot be made but by livery of ſeiſin; which livery, being an actual manual tradition of the land, muſt take effect *in præſenti*, or not at all (q).

ON the creation of a *freehold* remainder, at one and the ſame time with a particular eſtate for years, we have before ſeen that at the common law livery muſt be made to the particular tenant (r). But if ſuch a remainder be created afterwards, expectant on a leaſe for years now in being, the livery muſt not be made to the leſſee for years, for then it operates nothing; "*nam quod ſemel meum eſt, amplius meum eſſe non poteſt* (s):" but it muſt be made to the

(p) Co. Litt. 46.
(q) See page 165.
(r) page 167.
(s) Co. Litt. 49.

remainder-

remainder-man himſelf, by conſent of the leſſee for years; for without his conſent no livery of the poſſeſſion can be given (t); partly becauſe ſuch forcible livery would be an ejectment of the tenant from his term, and partly for the reaſons before given (u) for introducing the doctrine of attornments.

LIVERY of ſeiſin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, leſſor, or his attorney, together with the feoffee, leſſee, or his attorney, (for this may as effectually be done by deputy or attorney, as by the principals themſelves in perſon) come to the land, or to the houſe; and there, in the preſence of witneſſes, declare the contents of the feoffment or leaſe, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other perſons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect. "I deliver theſe to you "in the name of ſeiſin of all the lands and tenements con- "tained in this deed." But, if it be of a houſe, the feoffor muſt take the ring, or latch of the door, the houſe being quite empty, and deliver it to the feoffee in the ſame form; and then the feoffee muſt enter alone, and ſhut the door, and then open it, and let in the others (w). If the conveyance or feoffment be of divers lands, lying ſcattered in one and the ſame county, then in the feoffor's poſſeſſion, livery of ſeiſin of any parcel, in the name of the reſt, ſufficeth for all (x); but, if they be in ſeveral counties, there muſt be as many liveries as there are counties. For, if the title to theſe lands comes to be diſputed, there muſt be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Beſides, antiently this ſeiſin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighbourhood, who atteſted ſuch delivery in the body or on the back of the deed; according to the rule of the feodal law (y), *pares debent intereſſe inveſtiturae feudi*,

(t) Co. Litt. 48.
(u) pag. 288.
(w) Co. Litt. 48. Weſt. Symb. 251.
(x) Litt. §. 414.
(y) *Feud. l.* 2. *t.* 58.

et

et non alii: for which this reaſon is expreſly given; becauſe the peers or vaſals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which ſtrangers might be apt to connive at. And though, afterwards, the ocular atteſtation of the *pares* was held unneceſſary, and livery might be made before any credible witneſſes, yet the trial, in caſe it was diſputed, (like that of all other (z) atteſtations) was ſtill reſerved to the *pares* or jury of the county (a). Alſo, if the lands be out on leaſe, though all lie in the ſame county, there muſt be as many liveries as there are tenants: becauſe no livery can be made in this caſe, but by the conſent of the particular tenant; and the conſent of one will not bind the reſt (b). And in all theſe caſes it is prudent, and uſual, to endorſe the livery of ſeiſin on the back of the deed, ſpecifying the manner, place, and time of making it; together with the names of the witneſſes (c). And thus much for livery in deed.

LIVERY in *law* is where the ſame is not made *on* the land, but *in ſight of it* only; the feoffer ſaying to the feoffee, "I give you yonder land, enter and take poſſeſſi-"on." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwiſe; unleſs he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as poſſible to the lands (d), will ſuffice without an entry (e). This livery in law cannot however be given or received by attorney, but only by the parties themſelves (f).

2 THE conveyance by *gift*, *donatio*, is properly applied to the creation of an eſtate-tail, as feoffment is to that of an eſtate in fee, and leaſe to that of an eſtate for life or years. It differs in nothing from a feoffment, but in the nature of the eſtate paſſing by it: for the operative words of conveyance in this caſe are *do* or *dedi* (g); and giſts in tail are equally

(z) See pag. 307.
(a) Gilb. Ten. 35.
(b) Dyer. 18.
(c) See appendix. No. I.
(d) Litt. §. 421. &c.
(e) Co. Litt. 48.
(f) *Ibid.* 52.
(g) Weſt's Symbol. 256.

imperfect

imperfect without livery of ſeiſin, as feoffments in fee-ſimple (h). And this is the only diſtinction that Littleton ſeems to make, when he ſays (i), "it is to be underſtood "that there is a feoffor and feoffee, donor and donee, leſ-"ſor and leſſee;" viz. feoffor is applied to a feoffment in fee-ſimple, donor to a gift in tail, and leſſor to a leaſe for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next ſpecies of deeds: which are,

3. GRANTS, *conceſſiones*; the regular method by the common law of tranferring the property of *incorporeal* hereditaments, or, ſuch things whereof no livery can be had (k). For which reaſon all corporeal hereditaments, as lands and houſes, are ſaid to lie *in livery*; and the others, as advowſons, commons, rents, reverſions, *&c.* to lie *in grant* (l). And the reaſon is given by Bracton (m) "*tra-*"*ditio*, or livery, *nihil aliud eſt quam rei corporalis de per-*"*ſona in perſonam, de manu in manum, tranſlatio aut in*"*poſſeſſionem inductio; ſed res incorporales, quae ſunt ipſum*"*jus rei vel corpori inhaerens, traditionem non patiuntur.*" Theſe therefore paſs merely by the delivery of the deed. And in ſignories or reverſions of lands, ſuch grant, together with the attornment of the tenant (while attornments were requiſite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate poſſeſſion. It therfore differs but little from a feoffment, except in its ſubject matter: for the operative words therein commonly uſed are *dedi et conceſſi*, "have "given and granted."

4 A LEASE is properly a conveyance of any lands or tenements, (uſually in conſideration of rent or other annual recompenſe) made for life, for years, or at will, but always for a *leſs* time than the leſſor hath in the premiſes, for if it be for the *whole* intereſt, it is more properly an aſſignment than a leaſe. The uſual words of operation in it are,

(h) Litt. §. 59.
(i) §. 57.
(k) Co. Litt. 9.
(l) *Ibid.* 172.
(m) *l.* 2. *c.* 18.

"demiſe,

"demiſe, grant, and to farm lett; *demiſi, conceſſi, et ad firmam tradidi.*" *Farm*, or *feorme*, is an old Saxon word ſignifying proviſions (n): and it came to be uſed inſtead of rent or render, becauſe antiently the greater part of rents were reſerved in proviſions; in corn, in poultry, and the like; till the uſe of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at preſent, by a gradual departure from the original ſenſe, the word *farm* is brought to ſignify the very eſtate or lands ſo held upon farm or rent. By this conveyance an eſtate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments: though livery of ſeiſin is indeed incident and neceſſary to one ſpecies of leaſes, *viz.* leaſes for life of corporeal hereditaments; but to no other.

Whatever reſtrictions, by the ſeverity of the feodal law, might in times of very high antiquity be obſerved with regard to leaſes; yet by the common law, as it has ſtood for many centuries, all perſons ſeized of any eſtate might lett leaſes to endure ſo long as their own intereſt laſted, but no longer. Therefore tenant in fee ſimple might lett leaſes of any duration; for he hath the whole intereſt: but tenant in tail, or tenant for life, could make no leaſes which ſhould bind the iſſue in tail or reverſioner; nor could a huſband, ſeiſed *jure uxoris*, make a firm or valid leaſe for any longer term than the joint lives of himſelf and his wife, for then his intereſt expired. Yet ſome tenants for life, where the fee-ſimple was in abeyance, might (with the concurrence of ſuch as have the guardianſhip of the fee) make leaſes of equal duration with thoſe granted by tenants in fee-ſimple: ſuch as parſons and vicars with conſent of the patron and ordinary (o). So alſo biſhops, and deans, and ſuch other ſole eccleſiaſtical corporations as are ſeiſed of the fee-ſimple of lands in their corporate right, might, with the concurrence and confirmation of ſuch perſons as the law requires, have made leaſes for years, or for life, eſtates in tail, or in fee, without any limitation or controul. And

(n) Spelm. *Gl.* 229.

(o) Co. Litt. 44.

corpora-

corporations aggregate might have made what eſtates they pleaſed, without the confirmation of any other perſon whatſoever. Whereas now by ſeveral ſtatutes, this power where it was unreaſonable, and might be made an ill uſe of, is reſtrained; and, where in the other caſes the reſtraint by the common law ſeemed too hard, it is in ſome meaſure removed. The former ſtatutes are called the *reſtraining*, the latter the *enabling* ſtatute. We will take a view of them all, in order of time.

AND, firſt, the *enabling* ſtatute, 32 Hen. VIII. c. 28. empowers three manner of perſons to make leaſes, to endure for three lives or one and twenty years, which could not do ſo before. As, firſt, tenant in tail, may by ſuch leaſes bind his iſſue in tail, but not thoſe in remainder or reverſion. Secondly, a huſband ſeiſed in right of his wife, in fee-ſimple or fee-tail, provided the wife joins in ſuch leaſe, may bind her and her heirs thereby. Laſtly, all perſons ſeiſed of an eſtate of fee-ſimple in right of their churches, except parſons and vicars, may (without the concurrence of any other perſon) bind their ſucceſſors. But then there muſt many requiſites be obſerved, which the ſtatute ſpecifies, otherwiſe ſuch leaſes are not binding (p). 1. The leaſe muſt be by indenture; and not by deed poll, or by parol. 2. It muſt begin from the making, or day of the making, and not at any greater diſtance of time. 3. If there be any old leaſe in being, it muſt be firſt abſolutely ſurrendered, or be within a year of expiring. 4. It muſt be *either* for twenty-one years, *or* three lives; and not for both. 5. It muſt not exceed the term of three lives, or twenty-one years, but may be for a ſhorter term. 6. It muſt be of corporeal hereditaments, and not of ſuch things as lie merely in grant; for no rent can be reſerved thereout by the common law, as the leſſor cannot reſort to them to diſtrein (q).

(p) Co. Litt. 44.

(q) But now by the ſtatute 5. Geo. III. c. 17. a leaſe of tithes or other incorporeal hereditaments, alone, may be granted by any biſhop or eccleſiaſtical or eleemoſynary corporation, and the ſucceſſor ſhall be intitled to recover the rent by an action of debt, which (in caſe of a freehold leaſe) he could not have brought at the common law.

7. It

7. It muſt be of lands and tenements moſt commonly lett for twenty years paſt; ſo that if they have been lett for above half the time (for eleven years out of the twenty) either for life, for years, at will, or by copy or court roll, it is ſufficient. 8. The moſt uſual and cuſtomary feorm or rent, for twenty years paſt, muſt be reſerved yearly on ſuch leaſe. 9. Such leaſes muſt not be made without impeachment of waſte. Theſe are the guards, impoſed by the ſtatute (which was avowedly made for the ſecurity of farmers and the conſequent improvement of tillage) to prevent unreaſonable abuſes, in prejudice of the iſſue, the wife, or the ſucceſſor, of the reaſonable indulgence here given.

NEXT follows, in order of time, the *diſabling* or *reſtraining* ſtatute, 1 Eliz. c. 19. (made entirely for the benefit of the ſucceſſor) which enacts, that all grants by archbiſhops and biſhops (which include even thoſe confirmed by the dean and chapter; the which, however long or unreaſonable, were good at common law) other than for the term of one and twenty years or three lives from the making, or without reſerving the uſual rent, ſhall be void. Concurrent leaſes, if confirmed by the dean and chapter, are held to be within the exception of this ſtatute, and therefore valid; provided they do not exceed (together with the leaſe in being) the term permitted by the act (r). But by a ſaving expreſly made, this ſtatute of 1 Eliz. did not extend to grants made by any biſhop to the crown; by which means queen Elizabeth procured many fair poſſeſſions to be made over to her by the prelates, either for her own uſe, or with intent to be granted out again to her favourites, whom ſhe thus gratified without any expreſs to herſelf. To prevent which (s) for the future, the ſtatute 1. Jac. I. c. 3. extends the prohibition to grants and leaſes made to the king, as well as any of his ſubjects.

NEXT comes the ſtatute 13 Eliz. c. 10. explained and enforced by the ſtatute 14 Eliz. c. 11 & 14. 18 Eliz. c. 11. and 43 Eliz. c. 29. which extend the reſtrictions, laid by

(r) Co. Litt. 45. (s) 11 Rep. 71.

the

the laſt mentioned ſtatute on biſhops, to certain other inferior corporations, both ſole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other eccleſiaſtical, or eleemoſynary corporations, and all parſons and vicars, are reſtrained from making any leaſes of their lands, unleſs under the following regulations: 1. They muſt not exceed twenty one years, or three lives, from the making. 2. The accuſtomed rent, or more, muſt be yearly reſerved thereon. 3. Houſes in corporations, or market towns, may be lett for forty years; provided they be not the manſion-houſes of the leſſors, nor have above ten acres of ground belonging to them; and provided the leſſee be bound to keep them in repair: and they may alſo be aliened in fee-ſimple for lands of equal value in recompenſe. 4. Where there is an old leaſe in being, no concurrent leaſe ſhall be made, unleſs where the old one will expire within three years. 5. No leaſe (by the equity of the ſtatute) ſhall be made without impeachment of waſte (t). 6. All bonds and covenants tending to fruſtrate the proviſions of the ſtatutes 13 & 18 Eliz. ſhall be void.

CONCERNING theſe reſtrictive ſtatutes there are two obſervations to be made. Firſt, that they do not, by any conſtruction, enable any perſons, to make ſuch leaſes as they were by common law diſabled to make. Therefore a parſon, or vicar, though he is reſtrained from making longer leaſes than for twenty-one years or three lives, even *with* the conſent of patron and ordinary, yet is not enabled to make any leaſe at all, ſo as to bind his ſucceſſor, *without* obtaining ſuch conſent (u). Secondly, that though leaſes contrary to theſe acts are declared void, yet they are good againſt the *leſſor* during his life, if he be a ſole corporation; and are alſo good againſt an aggregate corporation ſo long as the head of it lives, who is preſumed to be the moſt concerned in intereſt. For the act was intended for the benefit of the ſucceſſor only; and no man ſhall make an advantage of his own wrong (w).

(t) Co. Litt. 45.
(u) *Ibid.* 44.
(w) *Ibid.* 45.

THERE is yet another reſtriction with regard to college leaſes, by ſtatute 18 Eliz. ch. 6. which directs, that one third of the old rent, when paid, ſhould for the future be reſerved in wheat or malt, reſerving a quarter of wheat for each 6*s.* 8*d.* or a quarter of malt for every 5*s*; or that the leſſees ſhould pay for the ſame according to the price that wheat and malt ſhould be ſold for, in the market next adjoining to the reſpective colleges, on the market-day before the rent becomes due. This is ſaid (x) to have been an invention of lord treaſurer Burleigh, and ſir Thomas Smith, then principal ſecretary of ſtate; who, obſerving how greatly the value of money had ſunk, and the price of all proviſions riſen, by the quantity of bullion imported from the new-found Indies, (which effects were likely to increaſe to a greater degree) deviſed this method for upholding the revenues of colleges. Their foreſight and penetration has in this reſpect been very apparent: for, though the rent ſo reſerved in corn was at firſt but one third of the old rent, or half of what was ſtill reſerved in money, yet now the proportion is nearly inverted; and the money ariſing from corn rents is, *communibus annis*, almoſt double to the rents reſerved in money.

THE leaſes of beneficed clergymen are farther reſtrained, in caſe of their non-reſidence, by ſtatutes 13 Eliz. c. 20. 14 Eliz. c. 11. and 18 Eliz. c. 11. which direct, that, if any beneficed clergyman be abſent from his cure above fourſcore days in any one year, he ſhall not only forfeit one year's profit of his benefice, to be diſtributed among the poor of the pariſh; but that all leaſes made by him, of the profits of ſuch benefice, and all covenants and agreements of like nature, ſhall ceaſe and be void: except in the caſe of licenſed pluraliſts, who are allowed to demiſe the living, on which they are non-reſident, to their curates only; provided ſuch curates do not abſent themſelves above forty days in any one year. And thus much for leaſes, with their ſeveral enlargements and reſtrictions (y).

5. AN

(x) Strype's annals of Eliz.

(y) For the other learning relating to leaſes, which is very curious and diffuſive, I muſt refer the ſtudent to

5. AN *exchange* is a mutual grant of equal intereſts, the one in conſideration of the other. The word "exchange" is ſo individually requiſite and appropriated by law to this caſe, that it cannot be ſupplied by any other word or expreſſed by any circumlocution (z). The eſtates exchanged muſt be equal in quantity (a); not of *value*, for that is immaterial, but of *intereſt*; as fee-ſimple for fee-ſimple, a leaſe for twenty years for a leaſe for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery (b). But no livery of ſeiſin, even in exchanges of freehold, is neceſſary to perfect the conveyance (c): for each party ſtands in the place of the other, and occupies his right, and each of them hath already had corporal poſſeſſion of his own land. But entry muſt be made on both ſides; for, if either party die before entry, the exchange is void, for want of ſufficient notoriety (d). And ſo alſo, if two parſons, by conſent of patron and ordinary, exchange their preferments; and the one is preſented, inſtituted, and inducted, and the other is preſented, and inſtituted, but dies before induction; the former ſhall not keep his new benefice, becauſe the exchange was not completed, and therefore he ſhall return back to his own (e). For if, after an exchange of lands and other hereditaments, either party be evicted of thoſe which were taken by him in exchange, through defect of the other's title; he ſhall return back to the poſſeſſion of his own, by virtue of the implied warranty contained in all exchanges (f).

6. A PARTITION, is when two or more joint-tenants, coparceners, or tenants in common, agree to divide the lands ſo held among them in ſeveralty, each taking a diſtinct part. Here, as in ſome inſtances there is a unity of intereſt, and in all a unity of poſſeſſion, it is neceſſary

3 Bac. abridg. 295. (title *leaſes and terms for years*) where the ſubject is treated in a perſpicuous and maſterly manner; being ſuppoſed to be extracted from a manuſcript of ſir Geoffrey Gilbert.

(z) Co. Litt. 50, 51.

(a) Litt. §. 64, 65.
(b) Co. Litt. 51.
(c) Litt. §. 62.
(d) Co. Litt. 50.
(e) Perk. §. 288.
(f) pag. 301.

that they all mutually convey and aſſure to each other the ſeveral eſtates, which they are to take and enjoy ſeparately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common muſt have done it by deed: and in both caſes the conveyance muſt have been perfected by livery of ſeiſin (g). And the ſtatutes of 31 Hen. VIII. c. 1. and 32 Hen. VIII. c. 32. made no alteration in this point. But the ſtatute of frauds 29 Car. II. c. 3. hath now aboliſhed this diſtinction, and made a deed in all caſes neceſſary.

THESE are the ſeveral ſpecies of *primary*, or *original* conveyances. Thoſe which remain are of the *ſecondary*, or *derivative* ſort; which preſuppoſe ſome other conveyance precedent, and only ſerve to enlarge, confirm, alter, reſtrain, reſtore, or transfer the intereſt granted by ſuch original conveyance. As,

7. RELEASES; which are a diſcharge or conveyance of a man's right in lands or tenements, to another that hath ſome former eſtate in poſſeſſion. The words generally uſed therein are "remiſed, releaſed, and for ever quit-claim-"ed (h)." And theſe releaſes may enure either, 1. By way of *enlarging an eſtate*, or *enlarger l'eſtate:* as, if there be tenant for life or years, remainder to another in fee, and he in remainder releaſes all his right to the particular tenant and his heirs, this gives him the eſtate in fee (i). But in this caſe the releſſee muſt be in *poſſeſſion* of ſome eſtate, for the releaſe to work upon; for if there be leſſee for years, and, before he enters and is in poſſeſſion, the leſſor releaſes to him all his right in the reverſion, ſuch releaſe is void for want of poſſeſſion in the releſſee (k). 2. By way of *paſſing an eſtate*, or *mitter l' eſtate:* as when one of two coparceners releaſeth all her right to the other, this paſſeth the fee-ſimple of the whole (l). And in both theſe caſes there muſt be a privity of eſtate between the releſſor and releſſee (m); that is, one of their eſtates muſt be ſo related to

(g) Litt. §. 250. Co. Litt. 169.
(h) Litt. §. 445.
(i) *Ibid.* §. 465.
(k) *Ibid.* §. 459.
(l)) Co. Litt. 273.
(m) *Ibid.* 272, 273.

the

the other, as to make but one and the ſame eſtate in law. 3. By way of *paſſing a right*, or *mitter le droit:* as if a man be diſſeiſed, and releaſeth to his diſſeiſor all his right; hereby the diſſeiſor acquires a new right, which changes the quality of his eſtate, and renders that lawful which before was tortious (n). 4. By way of *extinguiſhment:* as if my tenant for life makes a leaſe to A for life, remainder to B and his heirs, and I releaſe to A; this extinguiſhes my right to the reverſion, and ſhall enure to the advantage of B's remainder as well as of A's particular eſtate (o). 5. By way of *entry and feoffment:* as if there be two joint diſſeiſors, and the diſſeiſee releaſes to one of them, he ſhall be ſole ſeiſed, and ſhall keep out his former companion; which is the ſame in effect as if the diſſeiſee had entered, and thereby put an end to the diſſeiſin, and afterwards had enfeoffed one of the diſſeiſors in fee (p). And hereupon we may obſerve, that when a man has in himſelf the poſſeſſion of lands, he muſt at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man only has a right or a future intereſt, he may convey that right or intereſt by a mere releaſe to him that is in poſſeſſion of the land: for the occupancy of the releſſee is a matter of ſufficient notoriety already.

8. A CONFIRMATION is of a nature nearly allied to a releaſe. Sir Edward Coke defines it (q) to be a conveyance of an eſtate or right *in eſſe*, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular eſtate is encreaſed: and the words of making it are theſe, "have "given, granted, ratified, approved, and confirmed (r)." An inſtance of the firſt branch of the definition is, if tenant for life leaſeth for forty years, and dieth during that term; here the leaſe for years is voidable by him in reverſion: yet, if he hath confirmed the eſtate of the leſſee for years, before the death of the tenant for life, is no longer voidable but ſure (s). The latter branch, or that which

(n) Litt. §. 466.
(o) *Ibid.* §. 470.
(p) Co. Litt. 278.
(q) 1 Inſt. 295.
(r) Litt. §. 515. 531.
(s) *Ibid.* §. 516.

tends to the encreaſe of a particular eſtate, is the ſame in all reſpects with that ſpecies of releaſe, which operates by way of enlargement.

9. A SURRENDER, *ſurſumreditio*, or rendering up, is of a nature directly oppoſite to a releaſe; for, as that operates by the greater eſtate's deſcending upon the leſs, a ſurrender is the falling of a leſs eſtate into a greater by deed. It is defined (t), a yielding up of an eſtate for life or years to him that hath the immediate reverſion or remainder, wherein the particular eſtate may merge or drown, by mutual agreement between them. It is done by theſe words, "hath ſurrendered, granted, and yielded up." The ſurrenderor muſt be in poſſeſſion (u); and the ſurrenderee muſt have a higher eſtate, in which the eſtate ſurrendered may merge: therefore tenant for life cannot ſurrender to him in remainder for years (w). In a ſurrender there is no occaſion for livery of ſeiſin (x); for there is a privity of eſtate between the ſurrenderor, and the ſurrenderee; the one's particular eſtate, and the other's remainder are one and the ſame eſtate; and livery having been once made at the creation of it, there is no neceſſity for having it afterwards. And, for the ſame reaſon, no livery is required on a releaſe or confirmation in fee to tenant for years or at will, though a freehold thereby paſſes; ſince the reverſion of the releſſor, or confirmor, and the particular eſtate of the releſſee, or confirmee, are one and the ſame eſtate; and where there is already a poſſeſſion, derived from ſuch a privity of eſtate, any farther delivery of poſſeſſion would be vain and nugatory (y).

10. An *aſſignment* is properly a transfer, or making over to another, of the right one has in *any* eſtate; but it is uſually applied to an eſtate for life or years. And it differs from a leaſe only in this: that by a leaſe one grants an intereſt leſs than his own, reſerving to himſelf a reverſion; in aſſignments he

(t) Co. Litt. 337.
(u) *Ibid.* 338.
(w) Perk. §. 589.
(x) Co. Litt. 50.
(y) Litt. §. 460.

parts

parts with the whole property, and the aſſignee ſtands to all intents and purpoſes in the place of the aſſignor.

11. A DEFEAZANCE is a collateral deed, made at the ſame time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the eſtate then created may be *defeated* (z) or totally undone. And in this manner mortgages were in former times uſually made; the mortgager enfeoffing the mortgagee, and he at the ſame time executing a deed of defeazance, whereby the feoffment was rendered void on re-payment of the money borrowed at a certain day. And this, when executed at the ſame time with the original feoffment, was conſidered as part of it by the antient law (a); and, therefore only, indulged: no ſubſequent ſecret revocation of a ſolemn conveyance, executed by livery of ſeiſin, being allowed in thoſe days of ſimplicity and truth; though, when uſes were afterwards introduced, a revocation of ſuch uſes was permitted by the courts of equity. But things that were merely executory, or to be compleated by matter ſubſequent, (as rents, of which no ſeiſin could be had till the time of payment; and ſo alſo annuities, conditions, warranties, and the like) were always liable to be recalled by defeazances made ſubſequent to the time of their creation (b).

II. THERE yet remain to be ſpoken of ſome few conveyances, which have their force and operation by virtue of the *ſtatute of uſes*.

USES and *truſts* are in their original of a nature very ſimilar, or rather exactly the ſame: anſwering more to the *fidei-commiſſum* than the *uſus-fructus*, of the civil law; which latter was the temporary right of uſing a thing, without having the ultimate property, or full dominion of the ſubſtance (c). But the *fidei-commiſſum*, which uſually was created by will, was the diſpoſal of an inheritance to one, in confidence that he ſhould convey it or diſpoſe

(z) From the French verb *defaire*, *infectum reddere*.
(a) Co. Litt. 236.
(b) *Ibid.* 237.
(c) *Ff.* 7. 1. 1.

of the profits at the will of another. And it was the buſineſs of a particular magiſtrate, the *praetor fidei-commiſſarius*, inſtituted by Auguſtus, to enforce the obſervance of this confidence (d). So that the right thereby given was looked upon as a veſted right, and entitled to a remedy from a court of juſtice: which occaſioned that known diviſion of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary courſe of law; *jus fiduciarium*, a right in truſt, for which there was a remedy in conſcience; and *jus precarium*, a right in curteſy, for which the remedy was only by entreaty or requeſt (e). In our law, a uſe might be ranked under the rights of the ſecond kind; being a confidence repoſed in another who was tenant in the land, or *terre-tenant*, that he ſhould diſpoſe of the land according to the intentions of *ceſtuy que uſe*, or him to whoſe uſe it was granted, and ſuffer him to take the profits (f). As, if a feoffment was made to A and his heirs, to the uſe of (or in truſt for) B and his heirs; here at the common law A the *terre-tenant* had the legal property and poſſeſſion of the land, but B the *ceſtuy que uſe* was in conſcience and equity to have the profits and diſpoſal of it.

THIS notion was tranſplanted into England from the civil law, about the cloſe of the reign of Edward III (g), by means of the foreign eccleſiaſtics; who introduced it to evade the ſtatutes of mortmain, by obtaining grants of lands, not to their religious houſes directly, but to *the uſe of* the religious houſes (h): which the clerical chancellors of thoſe times held to be *fidei-commiſſa*, and binding in conſcience; and therefore aſſumed the juriſdiction, which Auguſtus had veſted in his *praetor*, of compelling the execution of ſuch truſts in the court of chancery. And, as it was moſt eaſy to obtain ſuch grants from dying perſons, a maxim was eſtabliſhed, that though by law the lands themſelves were not deviſable, yet if a teſtator had enfeoffed another to his own uſe, and ſo was poſſeſſed of the uſe only, ſuch uſe was deviſable by will. But we have

(d) *Inſt.* 2. *tit.* 23.
(e) *Ff.* 43. 26. 1. Bacon on uſes. 8. 306.
(f) Plowd. 352.
(g) Stat. 50. Edw. III. c. 6. 1 Ric. II. c. 9.
(h) See pag. 271.

ſeen

ſeen (i) how this evaſion was cruſhed in its infancy, by ſtatute 15 Rich. II. c. 5. with reſpect to religious houſes.

YET, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently and ſometimes very laudably, applied to a number of civil purpoſes: particularly as it removed the reſtraint of alienations by will, and permitted the owner of lands in his life-time to make various deſignations of their profits, as prudence, or juſtice, or family convenience, might from time to time require. Till at length, during our long wars in France, and the ſubſequent civil commotions between the houſes of York and Lancaſter, uſes grew almoſt univerſal: through the deſire that men had (when their lives were continually in hazard) of providing for their children by will, and of ſecuring their eſtates from forfeitures; when each of the contending parties, as they became uppermoſt, alternately attainted the other. Wherefore about the reign of Edward IV, (before whoſe time, lord Bacon remarks (k), there are not ſix caſes to be found relating to the doctrine of uſes) the courts of equity began to reduce them to ſomething of a regular ſyſtem.

ORIGINALLY it was held that the chancery could give no relief, but againſt the very perſon himſelf intruſted for *ceſtuy que uſe*, and not againſt his heir or alienee. This was altered in the reign of Hen. VI, with reſpect to the heir (l); and afterwards the ſame rule, by parity of reaſon, was extended to ſuch alienees as had purchaſed either without a valuable conſideration, or with an expreſs notice of the uſe (m) But a purchaſor for a valuable conſideration, without notice, might hold the land diſcharged of any truſt or confidence. And alſo it was held, that neither the king or queen, on account of their dignity royal (n), nor any corporation aggregate, or account of its limited capacity (o), could be

(i) pag. 272.
(k) on uſes. 313.
(l) Keilw. 42. Yearbook 22 Edw. IV. 6.
(m) Keilw. 46. Bacon of uſes, 312.
(n) Bro. *Abr. tit. Feoffm. al uſes*, 31. Bacon of uſes, 346, 347.
(o) Bro. *Abr. tit. Feoffm. al uſes*, 40. Bacon, 347.

ſeiſed

ſeiſed to any uſe but their own; that is, they might hold the lands, but were not compellable to execute the truſt. And, if the feoffee to uſes died without heir, or committed a forfeiture, or married, neither the lord who entered for his eſcheat or forfeiture, nor the huſband who retained the poſſeſſion as tenant by the curteſy, nor the wife who was aſſigned her dower, were liable to perform the uſe (p); becauſe they were not parties to the truſt, but came in by act of law: though doubtleſs their title in reaſon was no better than that of the heir.

ON the other hand the uſe itſelf, or intereſt of *ceſtuy que uſe*, was learnedly refined upon with many elaborate diſtinctions. And, 1. It was held that nothing could be granted to a uſe, whereof the uſe is inſeparable from the poſſeſſion; as annuities, ways, commons, and authorities, *quae ipſo uſu conſumuntur* (q): or whereof the ſeiſin could not be inſtantly given (r). 2. A uſe could not be raiſed without a ſufficient conſideration. For where a man makes a feoffment to another without any conſideration, equity preſumes that he meant it to the uſe of himſelf (s): unleſs he expreſsly declares it to be to the uſe of another, and then nothing ſhall be preſumed contrary to his own expreſſions (t). But, if either a good or a valuable conſideration appears, equity will immediately raiſe a uſe correſpondent to ſuch conſideration (u). 3. Uſes were deſcendible according to the uſes of the common law, in the caſe of inheritances in poſſeſſion (w); for in this and many other reſpects *equitas ſequitur legem*, and cannot eſtabliſh a different rule of property from that which the law has eſtabliſhed. 4. Uſes might be aſſigned by ſecret deeds between the parties (x), or be deviſed by laſt will and teſtament (y): for, as the legal eſtate in the ſoil was not transferred by theſe tranſactions, no livery of ſeiſin was neceſſary; and, as the intention of the parties was the leading principle of this ſpecies of property, any inſtrument declaring that intention was allowed to be binding in equity. But *ceſtuy que uſe* could

(p) 1 Rep. 122.
(q) 1 Jon. 127.
(r) Cro. Eliz. 401.
(s) See pag. 296.
(t) 1 And. 37.
(u) Moor. 684.
(w) 2 Roll. Abr. 780.
(x) Bacon of uſes, 312.
(y) *Ibid.* 308.

not

not at common law aliene the legal intereſt of the lands, without the concurrence of his feoffee (z); to whom he was accounted by law to be only tenant at ſufferance (a). 5. Uſes were not liable to any of the feodal burdens; and particularly did not eſcheat for felony or other defect of blood; for eſcheats, *&c.* are the conſequence of *tenure*, and uſes are *held* of nobody: but the land itſelf was liable to eſcheat, whenever the blood of the feoffee to uſes was extinguiſhed by crime or by defect; and the lord (as was before obſerved) might hold it diſcharged of the uſe (b). 6. No wife could be endowed, or huſband have his curteſy, of a uſe (c): for no truſt was declared for their benefit, at the original grant of the eſtate. And therefore it became cuſtomary, when moſt eſtates were put in uſe, to ſettle before marriage ſome joint eſtate to the uſe of the huſband and wife for their lives; which was the original of modern jointures (d). 7. A uſe could not be extended by writ of *elegit*, or other local proceſs, for the debts of *ceſtuy que uſe* (e). For, being merely a creature of equity, the common law, which looked no farther than the perſon actually ſeiſed of the land, could award no proceſs againſt it.

IT is impracticable, upon our preſent plan, to purſue the doctrine of uſes through all the refinements and niceties, which the ingenuity of the times (abounding in ſubtile diſquiſitions) deduced from this child of the imagination; when once a departure was permitted from the plain ſimple rules of property eſtabliſhed by the antient law. Theſe principal outlines will be fully ſufficient to ſhew the ground of lord Bacon's complaint (f), that this courſe of proceeding "was "turned to deceive many of their juſt and reaſonable rights. "A man, that had cauſe to ſue for land, knew not againſt "whom to bring his action, or who was the owner of it. "The wife was defrauded of her thirds; the huſband of his "curteſy; the lord of his wardſhip, relief, heriot, and eſ-

(z) Stat 1 Ric. III. c. 1.
(a) Bro. *Abr. ibid.* 23.
(b) Jenk. 190.
(c) 4 Rep. 1. 2 And. 75.
(d) See pag. 137.
(e) Bro. *Abr. tit. executions.* 90.
(f) Uſe of the Law. 153.

"cheat;

"cheat; the creditor of his extent for debt; and the poor "tenant of his leaſe." To remedy theſe inconveniences abundance of ſtatutes were provided, which made the lands liable to be extended by the creditors of *ceſtuy que uſe* (g); allowed actions for the freehold to be brought againſt him, if in the actual pernancy or enjoyment of the profits (h); made him liable to actions of waſte (i); eſtabliſhed his conveyances and leaſes made without the concurrence of his feoffees (k); and gave the lord the wardſhip of his heir, with certain other feodal perquiſites (l).

THESE proviſions all tended to conſider *ceſtuy que uſe* as the real owner of the eſtate; and at length that idea was carried into full effect by the ſtatute 27 Hen. VIII. c. 10. which is uſually called the *ſtatute of uſes*, or, in conveyances and pleadings, the ſtatute *for transferring uſes into poſſeſſion*. The hint ſeems to have been derived from what was done at the acceſſion of king Richard III; who having, when duke of Gloceſter, been frequently made a feoffee to uſes, would upon the aſſumption of the crown (as the law was then underſtood) have been entitled to hold the lands diſcharged of the uſe. But, to obviate ſo notorious an injuſtice, an act of parliament was immediately paſſed (m), which ordained that, where he had been ſo enfeoffed jointly with other perſons, the land ſhould veſt in the other feoffees as if he had never been named; and that, where he ſtood ſolely infeoffed, the eſtate itſelf ſhould veſt in *ceſtuy que uſe* in like manner as he had the uſe. And ſo the ſtatute of Henry VIII, after reciting the various inconveniences before-mentioned and many other acts, enacts, that "when any perſon ſhall be *ſeiſed* of lands, &c. to the uſe, "confidence, or truſt, of any other perſon or body poli-"tic, the perſon or corporation entitled to the uſe in fee-"ſimple, fee-tail, for life, or years, or otherwiſe, ſhall

(g) Stat. 50 Edw. III. c. 6. 2 Ric. II. ſeſſ. 2. c. 3. 19 Hen. VII. c. 15.
(h) Stat. 1 Ric. II. c. 9. 4 Hen. IV. c. 7. 11. Hen. VI. c. 3. 1 Hen. VII. c. 1.
(i) Stat. 11 Hen. VI. c. 5.
(k) Stat. 1 Ric. III. c. 1.
(l) Stat. 4 Hen. VII. c. 17. 19 Hen. VII. c. 15.
(m) 1. Ric. III. c. 5.

"from

" from thenceforth ſtand and be ſeiſed or poſſeſſed of the " land, *&c.* of and in the like eſtates as they have in the " uſe, truſt, or confidence; and that the eſtate of the per- " ſon ſo ſeiſed to uſes ſhall be deemed to be in him or them " that have the uſe, in ſuch quality, manner, form, and " condition, as they had before in the uſe." The ſtatute thus *executes* the uſe, as our lawyers term it; that is, it conveys the poſſeſſion to the uſe, and transfers the uſe into poſſeſſion: thereby making *ceſtuy que uſe* complete owner of the lands and tenements, as well at law as in equity.

THE ſtatute having thus, not aboliſhed the conveyance to uſes, but only annihilated the intervening eſtate of the feoffee, and turned the intereſt of *ceſtuy que uſe* into a legal inſtead of an equitable ownerſhip; the courts of common law began to take cognizance of uſes, inſtead of ſending the party to ſeek his relief in chancery. And, conſidering them now as merely a mode of conveyance, very many of the rules before eſtabliſhed in equity were adopted with improvements by the judges of the common law. The ſame perſons only were held capable of being ſeiſed to a uſe, the ſame conſiderations were neceſſary for raiſing it, and it could only be raiſed of the ſame hereditaments, as formerly. But as the ſtatute, the inſtant it was raiſed, converted it into an actual poſſeſſion of the land, a great number of the incidents, that formerly attended it in its fiduciary ſtate, were now at an end. The land could not eſcheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaſor diſcharged of the uſe, nor liable to the dower or curteſy on account of the ſeiſin of ſuch feoffee; becauſe the legal eſtate never reſts in him for a moment, but is inſtantaneouſly transferred to *ceſtuy que uſe*, as ſoon as the uſe is declared. And, as the uſe and the land were now convertible terms, they became liable to dower, curteſy, and eſcheat, in conſequence of the ſeiſin of *ceſtuy que uſe*, who was now become the *terre-tenant* alſo; and they likewiſe were no longer deviſable by will.

THE

THE various neceſſities of mankind induced alſo the judges very ſoon to depart from the rigour and ſimplicity of the rules of the common law, and to allow a more minute and complex conſtruction upon conveyances to uſes than upon others. Hence it was adjudged, that the uſe need not always be executed the inſtant the conveyance is made: but, if it cannot take effect at that time, the operation of the ſtatute may wait till the uſe ſhall ariſe upon ſome future contingency, to happen within a reaſonable period of time; and in the mean while the antient uſe ſhall remain in the original grantor: as, when lands are conveyed to the uſe of A and B, after marriage ſhall be had between them (n), or the uſe of A and his heirs till B ſhall pay him a ſum of money, and then to the uſe of B and his heirs (o). Which doctrine, when deviſes by will were again introduced, and conſidered as equivalent in point of conſtruction to declarations of uſes, was alſo adapted in favour of *executory deviſes* (p). But herein theſe, which are called *contingent* or *ſpringing*, uſes differ from an executory deviſe, in that there muſt be a perſon ſeiſed to ſuch uſes at the time when the contingency happens, elſe they never can be executed by the ſtatute; and therefore, if the eſtate of the feoffee to ſuch uſe be deſtroyed by alienation or otherwiſe, before the contingency ariſes, the uſe is deſtroyed for ever (q): whereas by an executory deviſe the freehold itſelf is transferred to the future deviſee. And, in both theſe caſes, a fee may be limited to take effect after a fee (r); becauſe, though that was forbidden by the common law in favour of the lord's eſcheat, yet, when the legal eſtate was not extended beyond one fee-ſimple, ſuch ſubſequent uſes (after a uſe in fee) were before the ſtatute permitted to be limited in equity; and then the ſtatute executed the legal eſtate in the ſame manner as the uſe before ſubſiſted. It was alſo held that a uſe, though executed, may change from one to another by circumſtances *ex poſt facto* (s); as, if A makes a feoffment to the uſe of his

(n) 2 Roll. Abr. 791. Cro. Eliz. 439.
(o) Bro. *Abr. tit. Feoffm. al uſes.* 30.
(p) See page 173.
(q) 1 Rep. 134. 138. Cro. Eliz. 439.
(r) Pollexf. 78. 10 Mod. 423.
(s) Bro. *Abr. tit. Feoffm. al uſes.* 30.

intended

intended wife and her eldeſt ſon for their lives, upon the marriage the wife takes the whole uſe in ſeveralty; and, upon the birth of a ſon, the uſe is executed jointly in them both (t). This is ſometimes called a *ſecondary*, ſometimes a *ſhifting*, uſe. And, whenever the uſe limited by the deed expires, or cannot veſt, it returns back to him who raiſed it, after ſuch expiration or during ſuch impoſſibility, and is ſtiled a *reſulting* uſe. As, if a man makes a feoffment to the uſe of his intended wife for life, with remainder to the uſe of her firſt-born ſon in tail: here, till he marries the uſe reſults back to himſelf; after marriage, it is executed in the wife for life; and, if ſhe dies without iſſue, the whole reſults back to him in fee (u). It was likewiſe held, that the uſes originally declared may be revoked at any future time, and new uſes be declared of the land, provided the grantor reſerved to himſelf ſuch a power at the creation of the eſtate: whereas the utmoſt that the common law would allow, was a deed of defeazance coeval with the grant itſelf (and therefore eſteemed a part of it) upon events ſpecifically mentioned (w). And, in caſe of ſuch a revocation, theſe old uſes were held inſtantly to ceaſe, and the new ones to become executed in their ſtead (x). And this was permitted, partly to indulge the convenience, and partly the caprice of mankind; who (as lord Bacon (y) obſerves) have always affected to have the diſpoſition of their property revocable in their own time, and irrevocable ever afterwards.

BY this equitable train of deciſions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminiſhed. But one or two technical ſcruples, which the judges found it hard to get over, reſtored it with tenfold increaſe. They held it in the firſt place, that "no uſe could be limited on a uſe (z)," and that when a man bargains and ſells his land for money, which raiſes a uſe by implication to the bargainee, the limitation of a farther uſe to another perſon is repugnant

(t) Bacon of uſes. 351.
(u) *Ibid.* 350. 1 Rep. 120.
(w) See pag. 327.
(x) Co. Litt. 237.
(y) on uſes. 316.
(z) Dyer. 155.

and

and therefore void (a). And therefore, on a feoffment to A and his heirs, to the uſe of B and his heirs, in truſt for C and his heirs, they held that the ſtatute executed only the firſt uſe, and that the ſecond was a mere nullity: not adverting, that the inſtant the firſt uſe was executed in B, he became ſeiſed to the uſe of C, which ſecond uſe the ſtatute might as well be permitted to execute as it did the firſt; and ſo the legal eſtate might be inſtantaneouſly tranſmitted down, through a hundred uſes upon uſes, till finally executed in the laſt *ceſtuy que uſe*. Again; as the ſtatute mentions only ſuch perſons as were *ſeiſed* to the uſe of others, this was held not to extend to terms of years, or other chattel intereſts, whereof the termor is not *ſeiſed*, but only *poſſeſſed* (b); and therefore, if a term of one thouſand years be limited to A, to the uſe of (or in truſt for) B, the ſtatute does not execute this uſe, but leaves it as at common law (c). And laſtly, (by more modern reſolutions) where lands are given to one and his heirs, in truſt to receive and pay over the profits to another, this uſe is not executed by the ſtatute: for the land muſt remain in the truſtee, to enable him to perform the truſt (d).

Of the two more antient diſtinctions the courts of equity quickly availed themſelves. In the firſt caſe it was evident, that B was never intended by the parties to have any beneficial intereſt; and, in the ſecond, the *ceſtuy que uſe* of the term was expreſsly driven into the court of chancery to ſeek his remedy: and therefore that court determined, that though theſe were not *uſes*, which the ſtatute could execute, yet ſtill they were *truſts* in equity, which in conſcience ought to be performed. To this the reaſon of mankind aſſented, and the doctrine of uſes was revived, under the denomination of *truſts*: and thus, by this ſtrict conſtruction of the courts of law, a ſtatute made upon great deliberation, and introduced in the moſt ſolemn manner, has had little other effect than to make a ſlight alteration in the formal words of a conveyance (e).

(a) 1 And. 37. 136.
(b) Bacon law of uſes, 335. Jenk. 244.
(c) Poph. 76. Dyer. 369.
(d) 1 Equ. Caſ. abr. 383, 384.
(e) Vaugh. 50. Atk. 591.

How-

HOWEVER, the courts of equity, in the exerciſe of this new juriſdiction, have wiſely avoided in a great degree thoſe miſchiefs which made uſes intolerable. They now conſider a truſt-eſtate (either when expreſsly declared or reſulting by neceſſary implication) as equivalent to the legal ownerſhip, governed by the ſame rules of property, and liable to every charge in equity, which the other is ſubject to in law: and, by a long ſeries of uniform determinations, for now near a century paſt, with ſome aſſiſtance from the legiſlature, they have raiſed a new ſyſtem of rational juriſprudence, by which truſts are made to anſwer in general all the beneficial ends of uſes, without their inconvenience or frauds. The truſtee is conſidered as merely the inſtrument of conveyance, and can in no ſhape affect the eſtate, unleſs by alienation for a valuable conſideration to a purchaſor without notice (f); which, as *ceſtuy que uſe* is generally in poſſeſſion of the land, is a thing that can rarely happen. The truſt will deſcend, may be aliened, is liable to debts, to forfeiture, to leaſes and other incumbrances, nay even to the curteſy of the huſband, as if it was an eſtate at law. It has not yet indeed been ſubjected to dower, more from a cautious adherence to ſome haſty precedents (g), than from any well-grounded principle. It hath alſo been held not liable to eſcheat to the lord, in conſequence of attainder or want of heirs (h): becauſe the truſt could never be intended for his benefit. But let us now return to the ſtatute of uſes.

THE only ſervice, as was before obſerved, to which this ſtatute is now conſigned, is in giving efficacy to certain new and ſecret ſpecies of conveyances; introduced in order to render tranſactions of this ſort as private as poſſible, and to ſave the trouble of making livery of ſeiſin, the only antient conveyance of corporeal freeholds: the ſecurity and notoriety of which public inveſtiture abundantly overpaid the labour of going to the land, or of ſending an attorney in one's ſtead. But this now has given way to

(f) 2 Freem. 43.
(g) 1 Chanc. Rep. 254. 2 P. Wms. 640.
(h) Hardr. 494. Burgeſs and Wheate, Hil. 32 Geo. II. in Canc.

12. A TWELFTH ſpecies of conveyance, called a *covenant to ſtand ſeized to uſes:* by which a man, ſeiſed of lands, covenants in conſideration of blood or marriage that he will ſtand ſeiſed of the ſame to the uſe of his child, wife, or kinſman; for life, in tail, or in fee. Here the ſtatute executes at once the eſtate; for the party intended to be benefited, having thus acquired the uſe, is thereby put at once into corporal poſſeſſion of the land (i), without ever ſeeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon ſuch weighty and intereſting conſiderations as thoſe of blood or marriage.

13. A THIRTEENTH ſpecies of conveyance, introduced by this ſtatute, is that of a *bargain and ſale* of lands; which is a kind of a real contract, whereby the bargainor for ſome pecuniary conſideration bargains and ſells, that is, contracts to convey, the land to the bargainee; and becomes by ſuch bargain a truſtee for, or ſeized to the uſe of, the bargainee; and then the ſtatute of uſes completes the purchaſe (j): or, as it has been well expreſſed (k), the bargain firſt veſts the uſe, and then the ſtatute veſts the poſſeſſion. But as it was foreſeen that conveyances, thus made, would want all thoſe benefits of notoriety, which the old common law aſſurances were calculated to give; to prevent therefore clandeſtine conveyances of freeholds, it was enacted in the ſame ſeſſion of parliament by ſtatute 27 Hen. VIII. c. 16. that ſuch bargains and ſales ſhould not enure to paſs a freehold, unleſs the ſame be made by indenture, and enrolled within ſix months in one of the courts of Weſtminſter-hall, or with the *cuſtos rotulorum* of the county. Clandeſtine bargains and ſales of chattel intereſts, or leaſes for years, were thought not worth regarding, as ſuch intereſts were very precarious till about ſix years before (l); which alſo occaſioned them to be overlooked in framing the ſtatute of uſes: and therefore ſuch bargains and ſales are not directed to be enrolled. But how im-

(i) Bacon uſe of the law, 151.
(j) *Ibid.* 150.
(k) Cro. Jac. 696.
(l) See page 142.

poſſible

poſſible is it to foreſee, and provide againſt, *all* the conſequences of innovations! This omiſſion has given riſe to

14. A FOURTEENTH ſpecies of conveyance, *viz.* by *leaſe and releaſe*; firſt invented by ſerjeant Moore, ſoon after the ſtatute of uſes, and now the moſt common of any, and therefore not to be ſhaken; though very great lawyers (as, particularly, Mr. Noy) have formerly doubted its validity (m). It is thus contrived. A leaſe, or rather bargain and ſale, upon ſome pecuniary conſideration, for one year, is made by the tenant of the freehold to the leſſee or bargainee. Now this, without any enrollment, makes the bargainor ſtand ſeiſed to the uſe of the bargainee, and veſts in the bargainee the *uſe* of the term for a year; and then the ſtatute immediately annexes the *poſſeſſion*. He therefore, being thus in poſſeſſion, is capable of receiving a releaſe of the freehold and reverſion; which, we have ſeen before, (n), muſt be made to a tenant in poſſeſſion: and accordingly, the next day, a releaſe is granted to him (o). This is held to ſupply the place of livery of ſeiſin; and ſo a conveyance by leaſe and releaſe is ſaid to amount to a feoffment (p).

15. To theſe may be added deeds to *lead* or *declare the uſes* of other more direct conveyances, as feoffments, fines, and recoveries; of which we ſhall ſpeak in the next chapter: and,

16. DEEDS of *revocation of uſes*; hinted at in a former page (q), and founded in a previous power, reſerved at the raiſing of the uſes (r), to revoke ſuch as were then declared; and to appoint others in their ſtead, which is incident to the power of revocation (s). And this may ſuffice for a ſpecimen of conveyances founded upon the ſtatute of uſes; and will finiſh our obſervations upon ſuch deeds as ſerve to *transfer* real property.

(m) 2 Mod. 252.
(n) page 324.
(o) See appendix. N°. II. §. 1, 2.
(p) Co. Litt. 270. Cro. Jac. 604.
(q) page 335.
(r) See appendix. N°. II. page xi.
(s) Co. Litt. 237.

BEFORE we conclude, it will not be improper to ſubjoin a few remarks upon ſuch deeds as are uſed not to *convey*, but to *charge* or incumber, lands, and *diſcharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeazances*, upon them both.

1. AN *obligation*, or bond, is a deed (t) whereby the obligor obliges himſelf, his heirs, executors, and adminiſtrators, to pay a certain ſum of money to another at a day appointed. If this be all, the bond is called a ſingle one, *ſimplex obligatio*; but there is generally a condition added, that if the obligor does ſome particular act, the obligation ſhall be void, or elſe ſhall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal ſum of money borrowed of the obligee, with intereſt, which principal ſum is uſually one half of the penal ſum ſpecified in the bond. In caſe this condition is not performed, the bond becomes forfeited, or abſolute at law, and charges the obligor while living; and after his death the obligation deſcends upon his heir, who (on defect of perſonal aſſets) is bound to diſcharge it, provided he has real aſſets by deſcent as a recompenſe. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands. How it affects the perſonal property of the obligor, will be more properly conſidered hereafter.

If the condition of a bond be impoſſible at the time of making it, or be to do a thing contrary to ſome rule of law that is merely poſitive, or be uncertain, or inſenſible, the condition alone is void, and the bond ſhall ſtand ſingle and unconditional: for it is the folly of the obligor to enter into ſuch an obligation, from which he can never be releaſed. If it be to do a thing that is *malum in ſe*, the obligation itſelf is void: for the whole is an unlawful contract, and the obligee ſhall take no advantage from ſuch a tranſaction. And if the condition be poſſible at the time of making

(t) See Appendix. N°. III. page xiii.

it,

it, and afterwards becomes impoſſible by the act of God, the act of law, or the act of the obligee himſelf, there the penalty of the obligation is ſaved: for no prudence or foreſight of the obligor could guard againſt ſuch a contingency (u). On the forfeiture of a bond, or its becoming ſingle, the whole penalty was recoverable at law: but here the courts of equity interpoſed, and would not permit a man to take more than in conſcience he ought; *viz.* his principal, intereſt, and expences, in caſe the forfeiture accrued by non-payment of money borrowed; the damages ſuſtained, upon non-performance of covenants; and the like. And the ſtatute 4 & 5 Ann. c. 16. hath alſo enacted, in the ſame ſpirit of equity, that in caſe of a bond, conditioned for the payment of money, the payment or tender of the principal ſum due, with intereſt, and coſts, even though the bond be forfeited and a ſuit commenced thereon, ſhall be a full ſatisfaction and diſcharge.

2. A *recognizance* is an obligation of record, which a man enters into before ſome court of record or magiſtrate duly authorized (w), with condition to do ſome particular act; as to appear at the aſſizes, to keep the peace, to pay a debt, or the like. It is in moſt reſpects like another bond: the difference being chiefly this; that the bond is the creation of a freſh debt or obligation *de novo*, the recognizance is an acknowledgement of a former debt upon record: the form whereof is, "that A. B. doth acknowledge to owe to "our lord the king, to the plaintiff, to C. D. or the like, "the ſum of ten pounds," with condition to be void on performance of the thing ſtipulated: in which caſe the king, the plaintiff, C. D. *&c.* is called the cognizee, "*is cui cog-*"*noſcitur*;" as he that enters into the recognizance is called the cognizor, "*is qui cognoſcit.*" This, being either certified to, or taken by the officer of ſome court, is witneſſed only by the record of that court, and not by the party's ſeal: ſo that it is not in ſtrict propriety a deed, though the effects of it are greater than a common obligation; being allowed a priority in point of payment, and

(u) Co. Litt. 206. (w) Bro. *Abr. tit. recognizance.* 24.

binding the lands of the cognizor, from the time of enrolment on record (x). There are alſo other recognizances, of a private kind, *in nature of a ſtatute ſtaple*, by virtue of the ſtatute 23 Hen. VIII. c. 6. which have been already explained (y), and ſhewn to be a charge upon real property.

3. A DEFEAZANCE, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the ſame manner as a defeazance of an eſtate before-mentioned. It differs only from the common condition of a bond, in that the one is always inſerted in the deed or bond itſelf, the other is made between the ſame parties by a ſeparate and frequently a ſubſequent deed (z). This, like the condition of a bond, when performed, diſcharges and diſincumbers the eſtate of the obligor.

THESE are the principal ſpecies of deeds or matter *in pais*, by which eſtates may be either conveyed, or at leaſt affected. Among which the conveyances to uſes are by much the moſt frequent of any; though in theſe there is certainly one palpable defect, the want of ſufficient notoriety: ſo that purchaſors or creditors cannot know with any abſolute certainty, what the eſtate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the antient feodal method of conveyance (by giving corporal ſeiſin of the lands) this notoriety was in ſome meaſure anſwered; but all the advantages reſulting from thence are now totally defeated by the introduction of death-bed deviſes and ſecret conveyances: and there has never been yet any ſufficient guard provided againſt fraudulent charges and incumbrances; ſince the diſuſe of the old Saxon cuſtom of tranſacting all conveyances at the county court, and entering a memorial of them in the chartulary or leger-book of ſome adjacent monaſtery (a): and the failure of the general regiſter eſtabliſhed by king Richard the firſt, for mortgages made to Jews, in the *capitula de*

(x) Stat. 29 Car. II. c. 3. §. 18.
(y) See page 160.
(z) Co. Litt. 237. 2 Saund. 47.
(a) Hickes *Diſſertat. epiſtolar.* 9.

Judæis,

Judæis, of which Hoveden has preſerved a copy. How far the eſtabliſhment of a like general regiſter, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deſerves to be well conſidered. In Scotland every act and event, regarding the tranſmiſſion of property, is regularly entered on record (b). And ſome of our own provincial diviſions, particularly the extended county of York, and the populous county of Middleſex, have prevailed with the legiſlature (c) to erect ſuch regiſters in their ſeveral diſtricts. But, however plauſible theſe proviſions may appear in theory, it hath been doubted by very competent judges, whether more diſputes have not ariſen in thoſe counties by the inattention and omiſſions of parties, than prevented by the uſe of regiſters.

(b) Dalrymple on feodal property. 262, &c.

(c) Stat. 2 & 3 Ann. c. 4. 6 Ann. c. 35. 7. Ann. c. 20. 8 Geo. II. c. 6.

CHAPTER THE TWENTY-FIRST.

OF ALIENATION BY MATTER OF RECORD.

ASSURANCES by *matter of record* are ſuch as do not entirely depend on the act or conſent of the parties themſelves: but the ſanction of a court of record is called in, to ſubſtantiate, preſerve, and be a perpetual teſtimony of, the transfer of property from one man to another; or of its eſtabliſhment, when already transferred. Of this nature are, 1. Private acts of Parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

I. PRIVATE *acts of parliament* are, eſpecially of late years, become a very common mode of aſſurance. For it may ſometimes happen, that by the ingenuity of ſome, and the blunders of other practitioners, an eſtate is moſt grievouſly entangled by a multitude of contingent remainders, reſulting truſts, ſpringing uſes, executory deviſes, and the like artificial contrivances; (a confuſion unknown to the ſimple conveyances of the common law) ſo that it is out of the power of either the courts of law or equity to relieve the owner. Or it may ſometimes happen, that, by the ſtrictneſs or omiſſions of family ſettlements, the tenant of the eſtate is abridged of ſome reaſonable power, (as letting leaſes, making a jointure for a wife, or the like) which power cannot be given him by the ordinary judges either in common law or equity. Or it may be neceſſary, in ſettling an eſtate, to ſecure it againſt the claims of infants or other perſons under legal diſabilities; who are not bound

bound by any judgments or decrees of the ordinary courts of juſtice. In theſe, or other caſes of the like kind, the tranſcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpoſe, to unfetter an eſtate; to give its tenant reaſonable powers; or to aſſure it to a purchaſor, againſt the remote or latent claims of infants or diſabled perſons, by ſettling a proper equivalent in proportion to the intereſt ſo barred. This practice was carried to a great length in the year ſucceeding the reſtoration; by ſetting aſide many conveyances alledged to have been made by conſtraint, or in order to ſcreen the eſtates from being forfeited during the uſurpation. And at laſt it proceeded ſo far, that, as the noble hiſtorian expreſſes it (a), every man had raiſed an equity in his own imagination, that he thought ought to prevail againſt any deſcent, teſtament, or act of law, and to find relief in parliament: which occaſioned the king at the cloſe of the ſeſſion to remark (b), that the good old rules of law are the beſt ſecurity; and to wiſh, that men might not have too much cauſe to fear, that the ſettlements which they make of their eſtates ſhall be too eaſily unſettled when they are dead, by the power of parliament.

Acts of this kind are however at preſent carried on, in both houſes, with great deliberation and caution; particularly in the houſe of lords they are uſually referred to two judges, to examine and report the facts alledged, and to ſettle all technical forms. Nothing alſo is done without the conſent, expreſsly given, of all parties in being and capable of conſent, that have the remoteſt intereſt in the matter; unleſs ſuch conſent ſhall appear to be perverſely and without any reaſon withheld. And, as was before hinted, an equivalent in money or other eſtate is uſually ſettled upon infants, or perſons not *in eſſe*, or not of capacity to act for themſelves, who are to be concluded by this act. And a general ſaving is conſtantly added, at the cloſe of the bill, of the right and intereſt of all perſons whatſo-

(a) Lord Clar. Contin. 162. (b) *Ibid.* 163.

ever;

ever; except thoſe whoſe conſent is ſo given or purchaſed, and who are therein particularly named.

A LAW, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the ſolemn act of the legiſlature. It is not therefore allowed to be a *public*, but a mere *private* ſtatute; it is not printed or publiſhed among the other laws of the ſeſſion; it hath been relieved againſt, when obtained upon fraudulent ſuggeſtions; and no judge or jury is bound to take notice of it, unleſs the ſame be ſpecially ſet forth and pleaded to them. It remains however enrolled among the public records of the nation, to be for ever preſerved as a perpetual teſtimony of the conveyance or aſſurance ſo made or eſtabliſhed.

II. THE *king's grants* are alſo matter of public record. For, as St. Germyn ſays (c), the king's excellency is ſo high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular ſubordination one with another, through which all the king's grants muſt paſs, and be tranſcribed, and enrolled; that the ſame may be narrowly inſpected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted. Theſe grants, whether of lands, honours, liberties, franchiſes, or aught beſides, are contained in charters, or letters *patent*, that is, open letters, *literæ patentes:* ſo called becauſe they are not ſealed up, but expoſed to open view; with the great ſeal pendant at the bottom; and are uſually directed or addreſſed by the king to all his ſubjects at large. And therein they differ from certain other letters of the king, ſealed alſo with his great ſeal, but directed to particular perſons, and for particular purpoſes: which thefore, not being proper for public inſpection, are cloſed up and ſealed on the outſide, and are thereupon called writs *cloſe*, *literæ clauſæ*; and are recorded in the *cloſe-rolls*, in the ſame manner as the others are in the *patent-rolls*.

(c) Dr. & Stud. l. 1. d. 8.

GRANTS

GRANTS or letters patent muſt firſt paſs by *bill:* which is prepared by the attorney and ſolicitor general, in conſequence of a warrant from the crown; and is then ſigned, that is, ſuperſcribed at the top, with the king's own *ſign manual*, and ſealed with his *privy ſignet*, which is always in the cuſtody of the principal ſecretary of ſtate; and then ſometimes it immediately paſſes under the great ſeal, in which caſe the patent is ſubſcribed in theſe words, "*per "ipſum regem*, by the king himſelf (d)." Otherwiſe the courſe is to carry an extract of the bill to the keeper of the *privy ſeal*, who makes out a writ or warrant thereupon to the chancery; ſo that the ſign manual is the warrant to the privy ſeal, and the privy ſeal is the warrant to the great ſeal: and in this laſt caſe the patent is ſubſcribed, "*per breve de privato ſigillo*, by writ of privy ſeal (e)." But there are ſome grants, which only paſs through certain offices, as the admiralty or treaſury, in conſequence of a *ſign manual*, without the confirmation of either the *ſignet*, the *great*, or the *privy ſeal*.

THE *manner* of granting by the king, does not more differ from that by a ſubject, than the *conſtruction* of his grants, when made. 1. A grant made by the king, *at the ſuit of the grantee*, ſhall be taken moſt beneficially *for* the king, and *againſt* the party: whereas the grant of a ſubject is conſtrued moſt ſtrongly *againſt the grantor*. Wherefore it is uſual to inſert in the king's grants, that they are made, not at the ſuit of the grantee, but "*ex ſpeciali gratia, certa ſcientia, et mero motu regis*;" and then they have a more liberal conſtruction (f). 2. A ſubject's grant ſhall be conſtrued to include many things, beſides what are expreſſed, if neceſſary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingreſs, egreſs, and regreſs, to cut and carry away thoſe profits, are alſo incluſively granted (g): and if a feoffment of land was made by a lord to his villein, this ope-

(d) 9 Rep. 18.
(e) *Ibid.* 2 Inſt. 555.
(f) Finch. L. 100. 10 Rep. 112.
(g) Co. Litt. 56.

rated

rated as a manumiſſion (h); for he was otherwiſe unable to hold it. But the king's grant ſhall not enure to any other intent, than that which is preciſely expreſſed in the grant. As if he grants land to an alien, it operates nothing; for ſuch grant ſhall not alſo enure to make him a a denizen, that ſo he may be capable of taking by grant (i). 3. When it appears, from the face of the grant, that the king is miſtaken, or deceived, either in matter of fact or matter of law, as in caſe of falſe ſuggeſtion, miſinformation, or miſrecital of former grants; or if his own title to the thing granted be different from what he ſuppoſes; or if the grant be informal; or if he grants an eſtate contrary to the rules of law; in any of theſe caſes the grant is abſolutely void (k). For inſtance; if the king grants lands to one and his *heirs male*, this is merely void: for it ſhall not be an eſtate-tail, becauſe there want words of procreation, to aſcertain the body, out of which the heirs ſhall iſſue: neither is it a fee-ſimple, as in common grants it would be; becauſe it may reaſonably be ſuppoſed, that the king meant to give no more than an eſtate-tail (l): the grantee is therefore (if any thing) nothing more than tenant at will (m). And, to prevent deceits of the king, with regard to the value of the eſtate granted, it is particularly provided by the ſtatute 1 Hen. IV. c. 6. that no grant of his ſhall be good, unleſs, in the grantee's petition for them, expreſs mention be made of the real value of the lands.

III. We are next to conſider a very uſual ſpecies of aſſurance, which is alſoof record; viz. a *fine* of lands and tenements. In which it will be neceſſary to explain, 1. The *nature* of a fine; 2. Its ſeveral *kinds*; and 3. Its *force* and *effect*.

A Fine is ſometimes ſaid to be a feoffment of record (n): though it might with more accuracy, be called an acknowledgment of a feoffment on record. By which is to be

(h) Litt. §. 206.
(i) Bro. *Abr. tit. Patent.* 62. Finch. L. 110.
(k) Freem. 172.
(l) Finch. 101, 102.
(m) Bro. *Abr. tit. Eſtates.* 34. *tit. Patents.* 104. Dyer. 270. Dav. 45.
(n) Co. Litt. 50.

underſtood,

underſtood, that it has at leaſt the ſame force and effect with a feoffment, in the conveying and aſſuring of lands: though it is one of thoſe methods of transferring eſtates of freehold by the common law, in which livery of ſeiſin is not neceſſary to be actually given; the ſuppoſition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be deſcribed to be an amicable compoſition or agreement of a ſuit, either actual or fictitious, by leave of the king or his juſtices; whereby the lands in queſtion become, or are acknowledged to be, the right of one of the parties (o). In its original it was founded on an actual ſuit, commenced at law for recovery of the poſſeſſion of land; and the poſſeſſion thus gained by ſuch compoſition was found to be ſo ſure and effectual, that fictitious actions were, and continue to be, every day commenced, for the ſake of obtaining the ſame ſecurity.

A FINE is ſo called becauſe it puts an *end*, not only to the ſuit thus commenced, but alſo to all other ſuits and controverſies concerning the ſame matter. Or, as it is expreſſed in an antient record of parliament (p.), 18 Edw. I. "*non in regno Angliae providetur, vel eſt, aliqua ſecuritas major vel ſolennior, per quam aliquis ſtatum certiorem habere poſſit, neque ad ſtatum ſuum verificandum aliquod ſolennius teſtimonium producere, quam finem in curia domini regis levatum: qui quidem finis ſic vocatur, eo quod finis et conſummatio omnium placitorum eſſe debet, et hac de cauſa providebatur.*" Fines indeed are of equal antiquity with the firſt rudiments of the law itſelf; are ſpoken of by Glanvil (q) and Bracton (r) in the reigns of Hen. II, and Hen. III, as things then well known and long eſtabliſhed; and inſtances have been produced of them even before the Norman invaſion (s). So that the ſtatute 18 Edw. I. called *modus levandi fines*, did not give them original, but only declared and regulated the manner in which they ſhould be levied, or carried on. And that is as follows:

(o) Co. Litt. 120.
(p) 2. Roll. Abr. 13.
(q) *l.* 8. *c.* 1.
(r) *l.* 5. *t.* 5. *c.* 28.
(s) Plowd. 369.

1. The

1. THE party, to whom the land is to be conveyed or aſſured, commences an action or ſuit at law againſt the other, generally an action of covenant, by ſuing out a writ or *praecipe*, called a writ of covenant (t): the foundation of which is a ſuppoſed agreement or covenant, that the one ſhall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by antient prerogative, a *primer fine*, or a noble for every five marks of land ſued for; that is, one tenth of the annual value (u). The ſuit being thus commenced, then follows,

2. THE *licentia concordandi*, or leave to agree the ſuit (w). For, as ſoon as the action is brought, the defendant, knowing himſelf to be in the wrong, is ſuppoſed to make evertures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon ſuing out the writ, given pledges to proſecute his ſuit, which he endangers if he now deſerts it without licence, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is alſo another fine due to the king by his prerogative; which is an antient revenue of the crown, and is called the *king's ſilver*, or ſometimes the *poſt fine*, with reſpect to the *primer fine* before-mentioned. And it is as much as the *primer fine*, and half as much more, or ten ſhillings for every five marks of land; that is, three twentieths of the ſuppoſed annual value (x).

3. NEXT comes the *concord*, or agreement itſelf (y), after leave obtained from the court; which is uſually an acknowledgment from the deforciants (or thoſe who keep the other out of poſſeſſion) that the lands in queſtion are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the *cognizor*, and he to whom it is levied the *cognizee*. This

(t) See Appendix, No. IV. §. 1.
(u) 2 Inſt. 511.
(w) Append. No. IV. §. 2.
(x) 5 Rep. 39. 2 Inſt. 511.
(y) Append. No. IV. §. 3.

acknowledg-

acknowledgment muſt be made either openly in the court of common pleas, or before one of the judges of that court, or elſe before commiſſioners in the country, empowered by a ſpecial authority called a writ of *dedimus poteſtatem*; which judges and commiſſioners are bound by ſtatute 18 Edw. I. ſt. 4. to take care that the cognizors be of full age, ſound memory, and out of priſon. If there be any feme-covert among the cognizors, ſhe is privately examined whether ſhe does it willingly and freely, or by compulſion of her huſband.

By theſe acts all the eſſential parts of a fine are completed; and, if the cognizor dies the next moment after the fine is acknowledged, provided it be ſubſequent to the day on which the writ is made returnable (z), ſtill the fine ſhall be carried on in all its remaining parts: of which the next is

4. The *note* of the fine (a): which is only an abſtract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This muſt be enrolled of record in the proper office, by direction of the ſtatute 5 Hen. IV. c. 14.

5. The fifth part is the *foot* of the fine, or concluſion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied (b). Of this there are indentures made, or engroſſed, at the chirographer's office, and delivered to the cognizor and the cognizee; uſually beginning thus, "*haec* "*eſt finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

By ſeveral ſtatutes ſtill more ſolemnities are ſuperadded, in order to render the fine more univerſally public, and leſs liable to be levied by fraud or covin. And, firſt, by 27

(z) Comb. 71.
(a) Append. N°. IV. §. 4.
(b) *Ibid.* §. 5.

Edw.

Edw. I. c. 1. the note of the fine ſhall be openly read in the court of common pleas, at two ſeveral days in one week, and during ſuch reading all pleas ſhall ceaſe. By 5 Hen. IV. c. 14. and 23 Eliz. c. 3. all the proceedings on fines, either at the time of acknowledgment, or previous, or ſubſequent thereto, ſhall be enrolled of record in the court of common pleas. By 1. Ric. III. c. 7. confirmed and enforced by 4 Hen. VII. c. 24. the fine, after engroſſment, ſhall be openly read and proclaimed in court ſixteen times; viz. four times in the term in which it is made, and four times in each of the three ſucceeding terms; during which time all pleas ſhall ceaſe: but this is reduced to once in each term by 31 Eliz. c. 2. and theſe proclamations are endorſed on the back of the record (c). It is alſo enacted by 23 Eliz. c. 3. that the chirographer of fines ſhall every term write out a table of the fines levied in each county in that term, and ſhall affix them in ſome open part of the court of common pleas all the next term: and ſhall alſo deliver the contents of ſuch table to the ſheriff of every county, who ſhall at the next aſſiſes fix the ſame in ſome open place in the court, for the more public notoriety of the fine.

2. FINES, thus levied, are of four kinds. 1. What in our law French is called a fine "*ſur cognizance de droit, come ceo que il ad de ſon done*;" or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor (d). This is the beſt and ſureſt kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in queſtion, and at the ſame time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in poſſeſſion, to have been made by him to the plaintiff. This fine is therefore ſaid to be a feoffment of record; the livery thus acknowledged in court, being equivalent to an actual livery: ſo that this aſſurance is rather a confeſſion of a former conveyance, than a conveyance now originally made; for the deforciant, or

(c) Append. No. IV. §. 6.

(d) This is that ſort, of which an example is given in the appendix, No. IV.

cognizor,

cognizor, acknowledges, *cognoſcit*, the right to be in the plaintiff, or cognizee, as that which he hath *de ſon done*, of the proper gift of himſelf, the cognizor. 2. A fine "*ſur cognizance de droit tantum*," or, upon acknowlegement of the right merely; not with the circumſtance of a preceding gift from the cognizor. This is commonly uſed to paſs a *reverſionary* intereſt, which is in the cognizor. For of ſuch reverſions there can be no feoffment, or donation with livery, ſuppoſed; as the poſſeſſion during the particular eſtate belongs to a third perſon (e). It is worded in this manner; "that the cognizor acknowleges the right "to be in the cognizee; and grants for himſelf and his "heirs, that the reverſion, after the particular eſtate deter-"mines, ſhall go to the cognizee (f). 3. A fine "*ſur con-*"*ceſſit*" is where the cognizor, in order to make an end of diſputes, though he acknowledges no precedent right, yet grants to the cognizee an eſtate *de novo*, uſually for life or years, by way of ſuppoſed compoſition. And this may be done reſerving a rent, or the like: for it operates on a new grant (g). 4. A fine "*ſur done, grant, et render*," is a double fine, comprehending the fine *ſur cognizance de droit come ceo, &c.* and the fine *ſur conceſſit*; and may be uſed to create particular limitations of eſtate: whereas the fine *ſur cognizance de droit come ceo, &c.* conveys nothing but an abſolute eſtate, either of inheritance, or at leaſt of freehold (h). In this laſt ſpecies of fine, the cognizee, after the right is acknowleged to be in him, grants back again, or renders to the cognizor, or perhaps, to a ſtranger, ſome other eſtate in the premiſes. But, in general, the firſt ſpecies of fine, "*ſur cognizance de droit come ceo, &c.*" is the moſt uſed, as it conveys a clear and abſolute freehold, and gives the cognizee a ſeiſin in law, without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

3. WE are next to conſider the *force* and *effect* of a fine. Theſe principally depend, at this day, on the common law, and the two ſtatutes, 4 Hen. VII. c. 24. and 32 Hen. VIII.

(e) Moor. 629.
(f) Weſt. Symb. p. 2. §. 95.
(g) Weſt. p. 2. §. 66.
(h) Salk. 340.

c. 36. The antient common law, with reſpect to this point, is very forcibly declared by the ſtatute 18 Edw. I. in theſe words. "And the reaſon, why ſuch ſolemnity is required "in the paſſing of a fine, is this; becauſe the fine is ſo high "a bar, and of ſo great force, and of a nature ſo powerful "in itſelf, that it precludes not only thoſe which are parties "and privies to the fine, and their heirs, but all other perſons "in the world, who are of full age, out of priſon, of ſound "memory, and within the four ſeas the day of the fine le-"vied; unleſs they put in their claim within a year and a "day." But this doctrine, of barring the right by *non-claim*, was aboliſhed for a time by a ſtatute made in 34 Edw. I. c. 16. which admitted perſons to claim, and falſify a fine, at any indefinite diſtance (i): whereby, as ſir Edward Coke obſerves (k), great contention aroſe, and few men were ſure of their poſſeſſions, till the parliament held 4 Hen. VII. reformed that miſchief, and excellently moderated between the latitude given by the ſtatute and the rigour of the common law. For the ſtatute, then made (l), reſtored the doctrine of non-claim; but extended the time of claim. So that now, by that ſtatute, the right of all ſtrangers whatſoever is bound, unleſs they make claim, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except *feme-coverts* infants, priſoners, perſons beyond the ſeas, and ſuch as are not of whole mind; who have five years allowed to them and their heirs, after the death of their huſbands, their attaining full age, recovering their liberty, returning into England, or being reſtored to their right mind.

IT ſeems to have been the intention of that politic prince, king Henry VII. to have covertly by this ſtatute extended fines to have been a bar of eſtates-tail, in order to unfetter the more eaſily the eſtates of his powerful nobility, and lay them more open to alienations; being well aware that power will always accompany property. But doubts having ariſen whether they could, by mere implication, be adjudged a ſufficient bar, (which they were expreſsly declared *not* to

(i) Litt. §. 441.
(k) 2 Inſt. 518.
(l) 4 Hen. VII. c. 24.

be

be by the ſtatute *de donis)* the ſtatute 32 Hen. VIII. c. 36. was thereupon made; which removes all difficulties, by declaring that a fine levied by any perſon of full age, to whom or to whoſe anceſtors lands have been entailed, ſhall be a perpetual bar to them and their heirs claiming by force of ſuch entail: unleſs the fine be levied by a woman after the death of her huſband, of lands which were, by the gift of him or his anceſtor, aſſigned to her in tail for her jointure (m); or unleſs it be of lands entailed by act of parliament or letters patent, and whereof the reverſion belongs to the crown.

FROM this view of the common law, regulated by theſe ſtatutes, it appears, that a fine is a ſolemn conveyance on record from the cognizor to the cognizee, and that the perſons bound by a fine are *parties*, *privies*, and *ſtrangers*.

THE *parties* are either the cognizors, or cognizees; and theſe are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almoſt the only act that a *feme-covert*, or married woman, is permitted by law to do, (and that becauſe ſhe is privately examined as to her voluntary conſent, which removes the general ſuſpicion of compulſion by her huſband) it is therefore the uſual and almoſt the only ſafe method, whereby ſhe can join in the ſale, ſettlement, or incumbrance, of any eſtate.

PRIVIES to a fine are ſuch as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of repreſentation. Such as are the heirs general of the cognizor, the iſſue in tail ſince the ſtatute of Henry the eighth, the vendee, the deviſee, and all others who muſt make title by the perſons who levied the fine. For the act of the anceſtor ſhall bind the heir, and the act of the principal his ſubſtitute, or ſuch as

(m) See ſtatute 11 Hen. VII. c. 20.

claim under any conveyance made by him ſubſequent to the fine ſo levied (n).

STRANGERS to a fine are all other perſons in the world, except only parties and privies. And theſe are alſo bound by a fine, unleſs, within five years after proclamations made, they interpoſe their claim; provided they are under no legal impediments, and have then a preſent intereſt in the eſtate. The impediments, as hath before been ſaid, are coverture, infancy, impriſonment, inſanity, and abſence beyond ſea: and perſons, who are thus incapacitated to proſecute their rights, have five years allowed them to put in their claims after ſuch impediments are removed. Perſons alſo that have not a preſent, but a future intereſt only, as thoſe in remainder or reverſion, have five years allowed them to claim in, from the time that ſuch right accrues (o). And if within that time they neglect to claim, or (by the ſtatute 4 Ann. c. 16.) if they do not bring an action to try the right, within one year after making ſuch claim, and proſecute the ſame with effect, all perſons whatſoever are barred of whatever right they may have, by force of the ſtatute of non-claim.

BUT, in order to make a fine of any avail at all, it is neceſſary that the parties ſhould have ſome intereſt or eſtate in the lands to be affected by it. Elſe it were poſſible that two ſtrangers, by a mere confederacy, might without any riſque defraud the owners by levying fines of their lands; for if the attempt be diſcovered, they can be no ſufferers, but muſt only remain *in ſtatu quo:* whereas if a tenant for life or years levies a fine, it is an abſolute forfeiture of his eſtate to the remainder-man or reverſioner (p), if claimed in proper time. It is not therefore to be ſuppoſed that ſuch tenants will frequently run ſo great a hazard; but if they do, and the claim is not duly made within five years after their reſpective terms expire (q), the eſtate is for ever barred

(n) 3 Rep. 87.
(o) Co. Litt. 372.
(p) *Ibid.* 251.
(q) 2 Lev. 52.

by

by it. Yet where a ſtranger, whoſe preſumption cannot thus be puniſhed, officiouſly interferes in an eſtate which in no wiſe belongs to him, his fine is of no effect; and may at any time be ſet aſide (unleſs by ſuch as are parties or privies (r) thereunto) by pleading that "*partes finis nihil habuerunt.*" And thus much for the conveyance or aſſurance by fine: which not only like other conveyances binds the grantor himſelf, and his heirs; but alſo all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

IV. THE fourth ſpecies of aſſurance, by matter of record, is a *common recovery*. Concerning the original of which, it was formerly obſerved (s), that the common recoveries were invented by the eccleſiaſtics to elude the ſtatutes of mortmain; and afterwards encouraged by the fineſſe of the courts of law in 12 Edw. IV. in order to put an end to all fettered inheritances, and bar not only eſtates-tail, but alſo all remainders and reverſions expectant thereon. I am now therefore only to conſider, firſt, the *nature* of a common recovery; and, ſecondly, its *force* and *effect*.

1. AND, firſt, the *nature* of it; or what a common recovery is. A common recovery is ſo far like a fine, that it is a ſuit or action, either actual or fictitious: and in it the lands are *recovered* againſt the tenant of the freehold; which recovery, being a ſuppoſed adjudication of the right, binds all perſons, and veſts a free and abſolute fee-ſimple in the recoveror. A recovery therefore being in the nature of an action at law, not immediately compromiſed like a fine, but carried on through every regular ſtage of proceeding, I am greatly apprehenſive that its form and method will not be eaſily underſtood by the ſtudent, who is not yet acquainted with the courſe of judicial proceedings; which cannot be thoroughly explained, till treated of at large in the third book of theſe commentaries. However I ſhall endeavour to ſtate its nature and progreſs, as clearly and con-

(r) Hob. 334. (s) pag. 117. 271.

ciſely as I can; avoiding, as far as poſſible, all technical terms, and phraſes not hitherto interpreted.

LET us, in the firſt place, ſuppoſe David Edwards (t) to be tenant of the freehold, and deſirous to ſuffer a common recovery, in order to bar all entails, remainders, and reverſions, and to convey the ſame in fee-ſimple to Francis Golding. To effect this, Golding is to bring an action againſt him for the lands; and he accordingly ſues out a writ, called a *praecipe quod reddat*, becauſe thoſe were its initial or moſt operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges, that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into poſſeſſion of it after one Hugh Hunt had turned the demandant out of it (v). The ſubſequent proceedings are made up into a record or recovery roll (u), in which the writ and complaint of the demandant are firſt recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is ſuppoſed, at the original purchaſe, to have warranted the title to the tenant; and thereupon he prays, that the ſaid Jacob Morland may be called in to defend the title which he ſo warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, deſires leave of the court to *imparl*, or confer with the vouchee in private; which is (as uſual) allowed him. And ſoon afterwards the demandant, Golding, returns to court, but Morland the vouchee diſappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in queſtion againſt the tenant, Edwards, who is now the recoveree: and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompenſe for the lands ſo warranted by him, and now loſt by his default; which is agreeable to the doctrine of warranty men-

(t) See Appendix, No. V.
(u) §. 2.
(v) §. 1.

tioned

tioned in the preceding chapter (w). This is called the recompenſe, or *recovery in value*. But Jacob Morland having no lands of his own, being uſually the crier of the court (who, from being frequently thus vouched, is called the *common vouchee*) it is plain that Edwards has only a nominal recompenſe for the lands ſo recovered againſt him by Golding; which lands are now abſolutely veſted in the ſaid recoveror by judgment of law, and ſeiſin thereof is delivered by the ſheriff of the county. So that this colluſive recovery operates merely in the nature of a conveyance in fee-ſimple, from Edwards the tenant in tail, to Golding the purchaſor.

THE recovery, here deſcribed, is with a *ſingle* voucher only; but ſometimes it is with *double*, *treble*, or farther vouchers, as the exigency of the caſe may require. And indeed it is now uſual always to have a recovery with double voucher at the leaſt; by firſt conveying an eſtate of freehold to any indifferent perſon, againſt whom the *praecipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee (x). For, if a recovery be had immediately againſt tenant in tail, it bars only ſuch eſtate in the premiſes of which he is then actually ſeiſed; whereas if the recovery be had againſt another perſon, and the tenant in tail be vouched, it bars every latent right and intereſt which he may have in the lands recovered (y). If Edwards therefore be tenant of the freehold in poſſeſſion, and John Barker be tenant in tail in remainder, here Edwards doth firſt vouch Barker, and then Barker vouches Jacob Morland the common vouchee; who is always the laſt perſon vouched, and always makes default: whereby the demandant Golding recovers the land againſt the tenant Edwards, and Edwards recovers a recompenſe of equal value againſt Barker the firſt vouchee; who recovers the like againſt Morland the common vouchee, againſt whom ſuch ideal recovery in value is always ultimately awarded.

(w) pag. 301.
(x) See Appendix, pag. xviii.
(y) Bro. *Abr. tit. Taile.* 32. Plowd. 8.

THIS ſuppoſed recompenſe in value is the reaſon why the iſſue in tail is held to be barred by a common recovery. For, if the recoveree ſhould ever obtain a recompenſe in lands from the common vouchee (which there is a poſſibility in contemplation of law, though a very improbable one, of his doing) theſe lands would ſupply the place of thoſe ſo recovered from him by colluſion, and would deſcend to the iſſue in tail (z). This reaſon will alſo hold, with equal force, as to *moſt* remainder-men and reverſioners; to whom the poſſibility will remain and revert, as a full recompenſe for the reality, which they were otherwiſe entitled to: but it will not *always* hold; and therefore, as Pigott ſays (a), the judges have been even *aſtuti*, in inventing other reaſons to maintain the authority of recoveries. And, in particular, it hath been ſaid, that, though the eſtate-tail is gone from the recoveree, yet it is not *deſtroyed*, but only *tranſferred*; and ſtill ſubſiſts, and will ever continue to ſubſiſt (by conſtruction of law) in the recoveror, his heirs, and aſſigns: and, as the eſtate-tail ſo continues to ſubſiſt for ever, the remainders or reverſions expectant on the determination of ſuch eſtate-tail can never take place.

To ſuch aukward ſhifts, ſuch ſubtile refinements, and ſuch ſtrange reaſoning, were our anceſtors obliged to have recourſe, in order to get the better of that ſtubborn ſtatute *de donis*. The deſign, for which theſe contrivances were ſet on foot, was certainly laudable; the unrivetting the fetters of eſtates-tail, which were attended with a legion of miſchiefs to the common-wealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of juſtice have indeed adopted a more manly way of treating the ſubject; by conſidering common recoveries in no other light, than as the formal mode of conveyance, by which tenant in tail is enabled to aliene his lands. But, ſince the ill conſequences of fettered inheritances are now generally ſeen and allowed, and of courſe the utility and expedience of ſetting them at liberty are apparent; it hath often been wiſhed, that the proceſs of this conveyance

(z) Dr. & S. l. 1. dial. 26.

(a) of com. recov. 13, 14.

was

was ſhortened, and rendered leſs ſubject to niceties, by either totally repealing the ſtatute *de donis*; which perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by veſting in every tenant in tail of full age the ſame abſolute fee-ſimple at once, which now he may obtain whenever he pleaſes, by the colluſive fiction of a common recovery; though this might poſſibly bear hard upon thoſe in remainder or reverſion, by abridging the chances they would otherwiſe frequently have, as no recovery can be ſuffered in the intervals between term and term, which ſometimes continue for near five months together: or, laſtly, by empowering the tenant in tail to bar the eſtate-tail by a ſolemn deed, to be made in term-time and enrolled in ſome court of record; which is liable to neither of the other objections, and is warranted not only by the uſage of our American colonies, but by the precedent of the ſtatute (b) 21 Jac. I. c. 19. which, in caſe of a bankrupt tenant in tail, empowers his commiſſioners to ſell the eſtate at any time, by deed indented and enrolled. And if, in ſo national a concern, the emoluments of the officers, concerned in paſſing recoveries, are thought to be worthy attention, thoſe might be provided for in the fees to be paid upon each enrollment.

2. THE *force* and *effect* of common recoveries may appear, from what has been ſaid, to be an abſolute bar not only of all eſtates-tail, but of remainders and reverſions expectant on the determination of ſuch eſtates. So that a tenant in tail may, by this method of aſſurance, convey the lands held in tail to the recoverer, his heirs and aſſigns, abſolutely free and diſcharged of all conditions and limitations in tail, and of all remaindors and reverſions. But, by ſtatute 34 & 35 Hen. VIII. c. 20. no recovery had againſt tenant in tail, of the king's gift, whereof the remainder or reverſion is in the king, ſhall bar ſuch eſtate-tail, or the remainder or reverſion of the crown. And by the ſtatute 11 Hen. VII. c. 20. no woman, after her huſband's death, ſhall ſuffer a recovery of lands ſettled on her in tail by way

(b) See pag. 286.

of

of jointure by her huſband or any of his anceſtors. And by ſtatute 14 Eliz. c. 8. no tenant for life, of any ſort, can ſuffer a recovery, ſo as to bind them in remainder or reverſion. For which reaſon, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is deſirous to ſuffer a valid recovery; either he, or the tenant to the *praecipe* by him made, muſt *vouch* the remainder-man in tail, otherwiſe the recovery is void: but if he does vouch ſuch remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears, and ſuffers the recovery to be had, it is as effectual to bar the eſtate-tail as if he himſelf were the recoveree (c).

IN all recoveries it is neceſſary that the recoveree, or tenant to the *praecipe*, as he is uſually called, be actually ſeiſed of the freehold, elſe the recovery is void (d). For all actions, to recover the ſeiſin of lands, muſt be brought againſt the actual tenant of the freehold, elſe the ſuit will loſe its effect; ſince the freehold cannot be recovered of him who has it not. And though theſe recoveries are in themſelves fabulous and fictitious, yet it is neceſſary that there be *actores fabulae*, properly qualified. But the nicety thought by ſome modern practitioners to be requiſite in conveying the legal freehold, in order to make a good tenant to the *praecipe*, is removed by the proviſions of the ſtatute 14 Geo. II. c. 20. which enacts, with a retroſpect and conformity to the antient rule of law (e), that, though the legal freehold be veſted in leſſees, yet thoſe who are intitled to the next freehold eſtate in remainder or reverſion may make a good tenant to the *praecipe:* and that, though the deed or fine which creates ſuch tenant be ſubſequent to the judgment of recovery, yet, if it be in the ſame term, the recovery ſhall be valid in law: and that, though the recovery itſelf do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *praecipe*, and declare the uſes of the recovery, ſhall after a

(c) Salk. 571. (d) Pigott. 28. (e) Pigott. 41, *&c.* 4 Burr. I. 115.

poſſeſſion

poſſeſſion of twenty years be ſufficient evidence, on behalf of a purchaſor for valuable conſideration, that ſuch recovery was duly ſuffered. And this may ſuffice to give the ſtudent a general idea of common recoveries, the laſt ſpecies of aſſurances by matter of record.

BEFORE I conclude this head, I muſt add a word concerning deeds to *lead*, or to *declare*, the *uſes* of fines, and of recoveries. For if they be levied or ſuffered without any good conſideration, and without any uſes declared, they, like other conveyances, enure only to the uſe of him who levies or ſuffers them (f). And if a conſideration appears, yet as the moſt uſual fine, "*ſur cognizance de droit come ceo, &c.*" conveys an abſolute eſtate, without any limitations, to the cognizee; and as common recoveries do the ſame to the recoveror; theſe aſſurances could not be made to anſwer the purpoſe of family ſettlements, (wherein a variety of uſes and deſignations is very often expedient) unleſs their force and effect were ſubjected to the direction of other more complicated deeds, wherein particular uſes can be more particularly expreſſed. The fine or recovery itſelf, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the vaſt and intricate machine of a voluminous family ſettlement. And, if theſe deeds are made previous to the fine or recovery, they are called deeds to *lead* the uſes; if ſubſequent deeds, to *declare* them. As, if A tenant in tail, with remainder to himſelf in fee, would ſettle his eſtate on B for life, remainder to C in tail, remainder to D in fee; this is what by law he has no power of doing effectually, while his own eſtate-tail is in being. He therefore uſually covenants to levy a fine (or, if there be any remainders over, to ſuffer a recovery) to E, and that the ſame ſhall enure to the uſes in ſuch ſettlement mentioned. This is now a deed to *lead* the uſes of the fine or recovery; and the fine when levied, or recovery when ſuffered, ſhall enure to the uſes ſo ſpecified, and no other. For though E, the conuſee or recoveree, hath a fee-ſimple veſted in himſelf by the fine or recovery; yet, by the

(f) Dyer. 18.

operation

operation of this deed, he becomes a mere inſtrument or conduit-pipe, ſeiſed only *to the uſe* of B, C, and D, in ſucceſſive order: which uſe is executed immediately, by force of the ſtatute of uſes (g). Or, if a fine or recovery be had without any previous ſettlement, and a deed be *afterwards* made between the parties, *declaring* the uſes to which the ſame ſhall be applied, this will be equally good, as if it had been expreſsly levied or ſuffered, in conſequence of a deed directing its operation to thoſe particular uſes. For by ſtatute 4 & 5 Ann. c. 16. indentures to *declare* the uſes of fines and recoveries, made *after* the fines and recoveries had and ſuffered, ſhall be good and effectual in law, and the fine and recovery ſhall enure to ſuch uſes, and be eſteemed to be only in truſt, notwithſtanding the ſtatute of frauds 29 Car. II. c. 3. enacts, that all truſts ſhall be declared in writing, *at* (and not *after*) the time when ſuch truſts are created.

(g) This doctrine may perhaps be more clearly illuſtrated by example. In the deed or marriage ſettlement in the appendix, N°. II. §. 2. we may ſuppoſe the lands to have been originally ſettled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reverſion to Cecilia Barker in fee; and now intended to be ſettled to the ſeveral uſes therein expreſſed, viz. of Abraham and Cecilia Barker till the marriage; remainder to John Barker for life; remainder to truſtees to preſerve the contingent remainders; remainder to his widow for life, for her jointure; remainder to other truſtees, for a term of five hundred years; remainder to their firſt and other ſons in tail; remainder to their daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is neceſſary, in order to bar the eſtate-tail of John Barker, and the remainders expectant thereon, that a recovery be ſuffered of the premiſes; and it is thought proper (for though uſual, it is by no means neceſſary: ſee Forreſter. 167.) that in order to make a good tenant of the freehold, or tenant to the *praecipe*, during the coverture, a fine ſhould be levied by Abraham, Cecilia, and John Barker; and it is agreed that the recovery itſelf be ſuffered againſt this tenant to the *praecipe*, who ſhall vouch John Barker, and thereby bar his eſtate-tail; and become tenant of the fee-ſimple by virtue of ſuch recovery: the uſes of which eſtate, ſo acquired, are declared to be thoſe expreſſed in this deed. Accordingly the parties covenant to do theſe ſeveral acts, (ſee pag. viii.) And in conſequence thereof the fine and recovery are had and ſuffered (N°. IV. and V.) of which this conveyance is a deed to *lead* the uſes.

CHAPTER

CHAPTER THE TWENTY SECOND.

OF ALIENATION BY SPECIAL CUSTOM.

WE are next to conſider aſſurances by ſpecial cuſtom, obtaining only in particular places, and relative only to a particular ſpecies of real property. This therefore is a very narrow title; being confined to copyhold lands, and ſuch cuſtomary eſtates, as are holden in antient demeſne, or in manors of a ſimilar nature: which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed; for, as that might tend to defeat the lord of his ſigniory, it is therefore a forfeiture of a copyhold (a). Nor are they transferrable by matter of record, even in the king's courts, but only in the court-baron of the lord. The method of doing this is generally by *ſurrender*; though in ſome manors, by ſpecial cuſtom, recoveries may be ſuffered of copyholds (b): but theſe differing in nothing material from recoveries of free land, ſave only that they are not ſuffered in the king's courts, but in the court baron of the manor, I ſhall confine myſelf to conveyances by ſurrender, and their conſequences.

SURRENDER, *ſurſumredditio*, is the yielding up of the eſtate by the tenant into the hands of the lord, for ſuch purpoſes as in the ſurrender are expreſſed. As, it may be, to the uſe and behoof of A and his heirs; to the uſe of his own will; and the like. The proceſs, in moſt manors, is, that

(a) Litt. §. 74. (b) Moor. 637.

the

the tenant comes to the ſteward, either in court, (or, if the cuſtom permits, out of court) or elſe to two cuſtomary tenants of the ſame manor, provided that alſo have a cuſtom to warrant it; and there by delivering up a rod, a glove, or other ſymbol, as the cuſtom directs, reſigns into the hands of the lord, by the hands and acceptance of his ſaid ſteward, or of the ſaid two tenants, all his intereſt and title to the eſtate; in truſt to be again granted out by the lord, to ſuch perſons and for ſuch uſes as are named in the ſurrender, and the cuſtom of the manor will warrant. If the ſurrender be made out of court, then, at the next or ſome ſubquent court, the jury or homage muſt preſent and find it upon their oaths; which preſentment is an information to the lord or his ſteward of what has been tranſacted out of court. Immediately upon ſuch ſurrender in court, or upon preſentment of a ſurrender made out of court, the lord by his ſteward grants the ſame land again to *ceſtuy que uſe*, (who is ſometimes, though rather improperly, called the ſurrenderee) to hold by the antient rights and cuſtomary ſervices; and thereupon admits him tenant to the copyhold, according to the form and effect of the ſurrender, which muſt be exactly purſued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the ſymbol, of corporal ſeiſin of the lands and tenements. Upon which admiſſion he pays a fine to the lord, according to the cuſtom of the manor, and takes the oath of fealty.

IN this brief abſtract, of the manner of transferring copyhold eſtates, we may plainly trace the viſible footſteps of the feodal inſtitutions. The fief, being of a baſe nature and tenure, is unalienabl without the knowlege and conſent of the lord. For this purpoſe it is reſigned up, or ſurrendered into his hands. Cuſtom, and the indulgence of the law, which favours liberty, has now given the tenant a right to name his ſucceſſor; but formerly it was far otherwiſe. And I am apt to ſuſpect that this right is of much the ſame antiquity with the introduction of uſes with reſpect to freehold lands: for the alienee of a copyhold had merely *jus fiduciarium*, for which there

there was no remedy at law, but only by *ſubpoena* in chancery (c). When therefore the lord had accepted a ſurrender of his tenant's intereſt, upon confidence to re-grant the eſtate to another perſon, either then expreſsly named or to be afterwards named in the tenant's will, the chancery enforced this truſt as a matter of conſcience; which juriſdiction, tho' ſeemingly new in the time of Edward IV (d), was generally acquieſced in, as it opened the way for the alienation of copyholds, as well as of freehold eſtates, and as it rendered the *uſe* of them both equally deviſable by teſtament. Yet, even to this day, the new tenant cannot be admitted but by compoſition with the lord, and paying him a fine by way of acknowlegement for the licence of alienation. Add to this the plain feodal inveſtiture, by delivering the ſymbol of feiſin in preſence of the other tenants in open court; "*quando* "*haſta vel aliud corporeum quidlibet porrigitur a domino ſe* "*inveſtituram facere dicente: quae ſaltem coram duobus va-*"*ſallis ſolenniter fieri debet* (e):" and, to crown the whole, the oath of fealty annexed, the very bond of feodal ſubjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the reſt of our tenures and eſtates, the very exiſtence of copyholds, and the manner in which they are transferred, would inconteſtably prove the very univerſal reception, which this northern ſyſtem of property for a long time obtained in this iſland; and which communicated itſelf, or at leaſt its ſimilitude, even to our very villeins and bondmen.

THIS method of conveyance is ſo eſſential to the nature of a copyhold eſtate, that it cannot poſſibly be transferred by any other aſſurance. No feoffment, fine, or recovery (in the king's courts) has any operation thereupon. If I would exchange a copyhold eſtate with another, I cannot do it by an ordinary deed of exchange at the common law; but we muſt ſurrender to each other's uſe, and the lord will admit us accordingly. If I would deviſe a copyhold, I muſt ſurrender it to the uſe of my laſt will and teſtament;

(c) Cro. Jac. 568.
(d) Bro. *Abr. tit. Tenant per copie.* 10.
(e) *Feud. l.* 2. *t.* 2.

and

and in my will I muſt declare my intentions, and name a deviſee, who will then be entitled to admiſſion (f).

IN order the more clearly to apprehend the nature of this peculiar aſſurance, let us take a ſeparate view of its ſeveral parts; the ſurrender, the preſentment, and the admittance.

1. A SURRENDER, by an admittance ſubſequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifeſtation of the alienor's intention, than a transfer of any intereſt in poſſeſſion. For, till admittance of *ceſtuy que uſe*, the lord taketh notice of the ſurrenderor as his tenant; and he ſhall receive the profits of the land to his own uſe, and ſhall diſcharge all ſervices due to the lord. Yet the intereſt remains in him not abſolutely, but *ſub modo*; for he cannot paſs away the land to any other, or make it ſubject to any other incumbrance than it was ſubject to at the time of the ſurrender. But no manner of legal intereſt is veſted in the nominee before admittance. If he enters, he is a treſpaſſer, and puniſhable in an action of treſpaſs: and if he ſurrenders to the uſe of another, ſuch ſurrender is merely void, and by no matter *ex poſt facto* can be confirmed. For though he be admitted in purſuance of the original ſurrender, and thereby acquires afterwards a ſufficient and plenary intereſt as abſolute owner, yet his ſecond ſurrender previous to his own admittance is abſolutely void *ab initio*; becauſe at the time of ſuch ſurrender he had but a poſſibility of an intereſt, and could therefore transfer nothing: and no ſubſequent admittance can make an act good, which was *ab initio* void. Yet, though upon the original ſurrender the nominee hath but a poſſibility, it is however ſuch a poſſibility, as may whenever he pleaſes be reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effect and fruits of the ſurrender; but if the lord refuſe to admit him, he is compellable to do it by a bill in chancery or a *mandamus* (g): and the ſurrenderor can in no wiſe defeat his grant; his hands being for ever bound from diſpoſing of the land

(f) Co. Copyh. §. 36.

(g) 2 Roll. Rep. 107.

in

in any other way, and his mouth for ever ſtopped from revoking or countermanding his own deliberate act (h); except in the caſe of a ſurrender to the uſe of his will, which is always revocable (j).

2. As to the *preſentment*: that, by the *general* cuſtom of manors, is to be made at the next court baron immediately after the ſurrender; but by *ſpecial* cuſtom in ſome places it will be good, though made at the ſecond or other ſubſequent court. And it is to be brought into court by the *ſame* perſons that took the ſurrender, and then preſented by the homage; and in all points material muſt correſpond with the true tenor of the ſurrender itſelf. And therefore, if the ſurrender be conditional, and the preſentment be abſolute, both the ſurrender, preſentment, and admittance thereupon are wholly void (i): the ſurrender, as being never truly preſented; the preſentment, as being falſe; and the admittance, as being founded on ſuch untrue preſentment. If a man ſurrenders out of court, and dies before preſentment, and preſentment be made after his death according to the cuſtom, this is ſufficient (k). So too, if *ceſtuy que uſe* dies before preſentment, yet, upon preſentment made after his death, his heir according to the cuſtom ſhall be admitted. The ſame law is, if thoſe, into whoſe hands the ſurrender is made, die before preſentment; for, upon ſufficient proof in court that ſuch a ſurrender was made, the lord ſhall be compelled to admit accordingly. And if the ſteward, the tenants, or others into whoſe hands ſuch ſurrender is made, do refuſe or neglect to bring it in to be preſented, upon a petition preferred to the lord in his court baron the party aggrieved ſhall find remedy. But if the lord will not do him right and juſtice, he may ſue both the lord, and them that took the ſurrender, in chancery, and ſhall there find relief (l).

(h) Co. Copyh. §. 39.
(j) 4 Rep. 23.
(i) Co. Copyh. 40.
(k) Co. Litt. 62.
(l) Co. Copyh. §. 40.

3. ADMITTANCE is the laſt ſtage, or perfection, of copyhold aſſurances. And this is of three ſorts: firſt, an admittance upon a voluntary grant from the lord; ſecondly, an admittance upon ſurrender by the former tenant; and thirdly, an admittance upon a deſcent from the anceſtor.

IN admittances, even upon a *voluntary grant* from the lord, when copyhold lands have eſcheated or reverted to him, the lord is conſidered as an inſtrument. For, though it is in his power to keep the lands in his own hands, or to diſpoſe of them at his pleaſure, by granting an abſolute fee-ſimple, a freehold, or a chattel intereſt therein; and quite to change their nature from copy-hold to ſocage tenure, ſo that he may well be reputed their abſolute owner and lord; yet, if he will ſtill continue to diſpoſe of them as copyhold, he is bound to obſerve the antient cuſtom preciſely in every point, and can neither in tenure or eſtate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this reſpect the law accounts him cuſtom's inſtrument. For if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may deſtroy the tenure and enfranchiſe the land, yet if he grants it out again by copy, he can neither add to nor diminiſh the antient rent, nor make any the minuteſt variation in other reſpects (m): nor is the tenant's eſtate, ſo granted, ſubject to any charges or incumbrances by the lord (n).

IN admittances upon *ſurrender* of another, the lord is to no intent reputed as owner, but wholly as an inſtrument: and the tenant admitted ſhall likewiſe be ſubject to no charges or incumbrances of the lord; for his claim to the eſtate is ſolely under him who made the ſurrender (o).

(m) Co. Cop. §. 41.
(n) 8 Rep. 63.
(o) 4 Rep. 27. Co. Litt. 59.

AND,

AND, as in admittances upon ſurrenders, ſo in admittances *upon deſcents* by the death of the anceſtor, the lord is uſed as a mere inſtrument; and, as no manner of intereſt paſſes into him by the ſurrender or the death of his tenant, ſo no intereſt paſſes out of him by the act of admittance. And therefore neither in the one caſe, nor the other, is any reſpect had to the quantity or quality of the lord's eſtate in the manor. For whether he be tenant in fee or for years, whether he be in poſſeſſion by right or by wrong, it is not material; ſince the admittances made by him ſhall not be impeached on account of his title, becauſe they are judicial, or rather miniſterial, acts, which every lord in poſſeſſion is bound to perform (p).

ADMITTANCES, however, upon ſurrender differ from admittances upon deſcent in this; that by ſurrender nothing is veſted in *ceſtuy que uſe* before admittance, no more than in voluntary admittances; but upon deſcent the heir is tenant by copy immediately upon the death of his anceſtor: not indeed to all intents and purpoſes, for he cannot be ſworn on the homage nor maintain an action in the lord's court as tenant; but to moſt intents the law taketh notice of him as of a perfect tenant of the land inſtantly upon the death of his anceſtor, eſpecially where he is concerned with any ſtranger. He may enter into the land before admittance; may take the profits; may puniſh any treſpaſs done upon the ground (q); nay, upon ſatisfying the lord for his fine due upon the deſcent, may ſurrender into the hands of the lord to whatever uſe he pleaſes. For which reaſons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to intitle him to his fine, and not ſo much neceſſary for the ſtrengthening and compleating the heir's title. Hence indeed an obſervation might ariſe, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come

(p) 4 Rep. 27. 1 Rep. 140. (q) 4 Rep. 23.

in and be admitted to his copyhold in court; and ſo the lord may be defrauded of his fine. But to this we may reply in the words of ſir Edward Coke (r), "I aſſure myſelf, "if it were in the election of the heir to be admitted or not "to be admitted, he would be beſt contented without admittance; but the cuſtom in every manor is in this point "compulſory. For, either upon pain of forfeiture of their "copyhold, or of incurring ſome great penalty, the heirs "of copyholders are inforced, in every manor, to come "into court and be admitted according to the cuſtom, "within a ſhort time after notice given of their anceſtor's "deceaſe."

(r) Copyh. §. 41.

CHAPTER

CHAPTER THE TWENTY THIRD.

OF ALIENATION BY DEVISE.

THE laſt method of conveying real property, is by *deviſe*, or diſpoſition contained in a man's laſt will and teſtament. And, in conſidering this ſubject, I ſhall not at preſent enquire into the nature of wills and teſtaments, which are more properly the inſtruments to convey perſonal eſtates; but only into the original and antiquity of deviſing real eſtates by will, and the conſtruction of the ſeveral ſtatutes upon which that power is now founded.

IT ſeems ſufficiently clear, that before the conqueſt, lands were deviſable by will (a). But, upon the introduction of the military tenures, the reſtraint of deviſing lands naturally took place, as a branch of the feodal doctrine of non-alienation without the conſent of the lord (b). And ſome have queſtioned, whether this reſtraint (which we may trace even from the antient Germans (c) was not founded upon truer principles of policy, than the power of wantonly diſinheriting the heir by will, and transferring the eſtate, through the dotage or caprice of the anceſtor, from thoſe of his blood to utter ſtrangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours; ſince it rarely happens,

(a) Wright of tenures. 172.
(b) See page 57.
(c) *Tacit. de mor. Germ. c.* 21.

that the ſame man is heir to many others, though by art and management he may frequently become their deviſee. Thus the antient law of the Athenians directed that the eſtate of the deceaſed ſhould always deſcend to his children; or, on failure of lineal deſcendants, ſhould go to the collateral relations: which had an admirable effect in keeping up equality, and preventing the accumulation of eſtates. But when Solon (d) made a ſlight alteration, by permitting them (though only on failure of iſſue) to diſpoſe of their lands by teſtament, and deviſe away eſtates from the collateral heir, this ſoon produced an exceſs of wealth in ſome, and of poverty in others: which, by a natural progreſſion, firſt produced popular tumults and diſſentions; and theſe at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total ſubverſion of their ſtate and nation. On the other hand, it would now ſeem hard, on account of ſome abuſes, (which are the natural conſequence of free agency, when coupled with human infirmity) to debar the owner of lands from diſtributing them after his death, as the exigence of his family affairs, or the juſtice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which reſulted from Solon's inſtitution, the too great accumulation of property: which is the natural conſequence of our doctrine of ſucceſſion by primogeniture, to which the Athenians were ſtrangers. Of this accumulation the ill effects were ſeverely felt even in the feodal times; but it ſhould always be ſtrongly diſcouraged in a commercial country, whoſe welfare depends on the number of moderate fortunes engaged in the extenſion of trade.

HOWEVER this be, we find that, by the common law of England ſince the conqueſt, no eſtate, greater than for term of years, could be diſpoſed of by teſtament (e); except only in Kent, and in ſome antient burghs, and a few particular manors, where their Saxon immunities by ſpecial indulgence ſubſiſted (f). And though the feodal reſtraint on alie-

(d) Plutarch. *in vita Solon.*
(e) 2 Inſt. 7.
(f) Litt. §. 167. 1 Inſt. 111.

nations

nations by deed vaniſhed very early, yet this on wills continued for ſome centuries after; from an apprehenſion of infirmity and impoſition on the teſtator *in extremis*, which made ſuch deviſes ſuſpicious (g). Beſides, in deviſes there was wanting that general notoriety, and public deſignation of the ſucceſſor, which in deſcents is apparent to the neighbourhood, and which the ſimplicity of the common law always required in every transfer and new acquiſition of property.

BUT when eccleſiaſtical ingenuity had invented the doctrine of uſes, as a thing diſtinct from the land, uſes began to be deviſed very frequently (h), and the deviſee of the uſe could in chancery compel its execution. For it is obſerved by Gilbert (j), that as the popiſh clergy then generally ſate in the court of chancery, they conſidered that men are moſt liberal when they can enjoy their poſſeſſions no longer; and therefore at their death would chooſe to diſpoſe of them to thoſe, who, according to the ſuperſtition of the times, could intercede for their happineſs in another world. But, when the ſtatute of uſes (i) had annexed the poſſeſſion to the uſe, theſe uſes, being now the very land itſelf, became no longer deviſable: which might have occaſioned a great revolution in the law of deviſes, had not the ſtatute of wills been made about five years after, viz. 32 Henry VIII. c. 1. explained by 34 Hen. VIII. c. 5. which enacted, that all perſons being ſeiſed in fee-ſimple (except feme-coverts, infants, ideots, and perſons of nonſane memory) might by will and teſtament in writing deviſe to any other perſon, but not to bodies corporate, two thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of thoſe held in ſocage: which now, through the alteration of tenures by the ſtatute of Charles the ſecond, amounts to the whole of their landed property, except their copyhold tenements.

CORPORATIONS were excepted in theſe ſtatutes, to prevent the extenſion of gifts in mortmain; but now, by

(g) Glanv. *l.* 7. *c.* 1.
(h) Plowd. 414.
(i) on deviſes. 7.
(j) 27 Hen. VIII. c. 10.

conſtruction of the ſtatute 43 Eliz. c. 4. it is held that a deviſe to a corporation for a charitable uſe is valid, as operating in the nature of an *appointment*, rather than of a *bequeſt*. And indeed the piety of the judges hath formerly carried them great lengths in ſupporting ſuch charitable uſes (k); it being held that the ſtatute of Elizabeth, which favours appointments to charities, ſuperſedes and repeals all former ſtatutes (l), and ſupplies all defects of aſſurances (m): and therefore not only a deviſe to a corporation, but a deviſe by a copyhold tenant without ſurrendering to the uſe of his will (n), and a deviſe (nay even a ſettlement) by tenant in tail without either fine or recovery, if made to a charitable uſe, are good by way of appointment (o).

With regard to deviſes in general, experience ſoon ſhewed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are ſo nicely conſtructed and ſo artificially connected together, that the leaſt breach in any one of them diſorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for ſo looſe was the conſtruction made upon this act by the courts of law, that bare notes in the hand writing of another perſon were allowed to be good wills within the ſtatute (p). To remedy which, the ſtatute of frauds and perjuries, 29 Car. II. c 3. directs, that all deviſes of lands and tenements ſhall not only be in writing, but ſigned by the teſtator, or ſome other perſon in his preſence, and by his expreſs direction; and be ſubſcribed, in his preſence, by three or four credible witneſſes. And a ſimilar ſolemnity is requiſite for revoking a deviſe.

In the conſtruction of this laſt ſtatute, it has been adjudged that the teſtator's name, written with his own hand, at the beginning of his will, as, "I John Mills do make this

(k) Ch. Prec. 272.
(l) Gilb. Rep. 45. 1 P. Wms. 248.
(m) Duke's charit. uſes. 84.
(n) Moor. 890.
(o) 2 Vern. 453. Ch. Prec. 16.
(p) Dyer. 72. Cro. Eliz. 100.

"my

"my last will and testament," is a sufficient signing, without any name at the bottom (q); though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times (r). But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument (s). And, in a case determined about twenty years ago (t), the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise; as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination however alarmed many purchasors and creditors, and threatened to shake many of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues, (and these are the persons most likely to be present in the testator's last illness), and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II. c. 6. which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such creditors to be admitted, but leaving their credit (as well as that of all other witnesses) to be considered, on a view of all the circum-

(q) 3 Lev. 1.
(r) Freem. 486. 2 Ch. Cas. 190. Pr. Ch. 185.
(s) 1 P. Wms. 740.
(t) Stra. 1253.

stance,

ſtances, by the court and jury before whom ſuch will ſhall be conteſted. And in a much later cauſe (u) the teſtimony of three witneſſes, who were creditors, was held to be ſufficiently credible, though the land was charged with the payment of debts; and the reaſons of the former determination were judged to be inſufficient.

ANOTHER inconvenience was found to attend this new method of conveyance by deviſe; in that creditors by bond and other ſpecialties, which affected the heir provided he had aſſets by deſcent, were now defrauded of their ſecurities, not having the ſame remedy againſt the deviſee of their debtor. To obviate which, the ſtatute 3 & 4 W. & M. c. 14. hath provided, that all wills, and teſtaments, limitations, diſpoſitions, and appointments of real eſtates, by tenants in fee-ſimple or having power to diſpoſe by will, ſhall (as againſt ſuch creditors only) be deemed to be fraudulent and void: and that ſuch creditors may maintain their actions jointly againſt both the heir and the deviſee.

A WILL of lands, made by the permiſſion and under the controul of theſe ſtatutes, is conſidered by the courts of law not ſo much in the nature of a teſtament, as of a conveyance declaring the uſes to which the lands ſhall be ſubject: with this difference, that in other conveyances the actual *ſubſcription* of the witneſſes is not required by law (w), though it is prudent for them ſo to do, in order to aſſiſt their memory when living, and to ſupply their evidence when dead; but in deviſes of lands ſuch ſubſcription is now abſolutely neceſſary by ſtatute, in order to identify a conveyance, which in its nature can never be ſet up till after the death of the deviſor. And upon this notion, that a deviſe affecting lands is merely a ſpecies of conveyance, is founded this diſtinction between ſuch deviſes and teſtaments of perſonal chattels; that the latter will operate upon whatever the teſtator dies poſſeſſed of, the former only upon ſuch real eſtates as were his at the time of executing and publiſhing his will (x). Wherefore no after-purchaſed lands

(u) M. 31 Geo. II. 4 Burr. I. 430. (x) 1 P. Wms. 575.
(w) See page 307.

will

will paſs under ſuch deviſe (y), unleſs ſubſequent to the purchaſe or contract (z), the deviſor re-publiſhes his will (a).

WE have now conſidered the ſeveral ſpecies of common aſſurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of juſtice, for the conſtruction and expoſition of them all. Theſe are

1. THAT the conſtruction be *favourable*, and as near the minds and apparent intents of the parties, as the rules of law will admit (b). For the maxims of law are, that "*verba intentioni debent inſervire*;" and "*benigne interpre-*"*tamur chartas propter ſimplicitatem laicorum.*" And therefore the conſtruction muſt alſo be *reaſonable*, and agreeable to common underſtanding (c).

2. THAT *quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba fienda eſt* (d): but that, where the *intention* is clear, too minute a ſtreſs be not laid on the ſtrict and preciſe ſignification of *words*; *nam qui haeret in litera, haeret in cortice*. Therefore, by a grant of a remainder a reverſion may well paſs, and *e converſo* (e). And another maxim of law is, that "*mala grammatica non vitiat chartam*;" neither falſe Engliſh nor bad Latin will deſtroy a deed (f). Which perhaps a claſſical critic may think to be no unneceſſary caution.

3. THAT the conſtruction be made upon the entire deed, and not merely upon diſjointed parts of it. "*Nam ex ante-*

(y) Moor. 255. 11 Mod. 127.
(z) 1 Ch. Caſ. 39. 2 Ch. Caſ. 144.
(a) Salk. 238.
(b) And. 60.
(c) 1 Bulſtr. 175. Hob. 304.
(d) 2 Saund. 157.
(e) Hob. 27.
(f) 10 Rep. 133. Co. Litt. 223. 2 Show. 334.

"*cedentibus*

"*cedentibus et conſequentibus fit optima interpretatio* (g)." And therefore that every part of it, be (if poſſible) made to take effect; and no word but what may operate in ſome ſhape or other (h). "*Nam verba debent intelligi cum effectu, ut res magis valeat quam pereat* (i).

4. THAT the deed be taken moſt ſtrongly againſt him that is the agent or contractor, and in favour of the other party. "*Verba fortius accipiuntur contra proferentem.*" For the principle of ſelf-preſervation will make men ſufficiently careful, not to prejudice their own intereſt by the too extenſive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expreſſions, provided they were afterwards at liberty to put their own conſtruction upon them. But here a diſtinction muſt be taken between an indenture and a deed pole: for the words of an indenture, executed by both parties, are to be conſidered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, but the other party hath given his conſent to every one of them. But in a deed poll, executed only by the grantor, they are the words of the grantor only, and ſhall be taken moſt ſtrongly againſt him (k). However, this, being a rule of ſome ſtrictneſs and rigor, is the laſt to be reſorted to, and is never to be relied upon, but where all other rules of expoſition fail (l).

5. THAT, if the words will bear two ſenſes, one agreeable to, and another againſt, law; that ſenſe be preferred, which is moſt agreeable thereto (m). As if tenant in tail letts a leaſe for life generally, it ſhall be conſtrued for his own life only, for that ſtands with the law; and not for the life of the leſſee, which is beyond his power to grant.

(g) 1 Bulſtr. 101.
(h) 1 P. Wms. 457.
(i) Plowd. 156.
(k) Plowd. 134.
(l) Bacon's Elem. c. 3.
(m) Co. Litt. 42.

6. THAT,

6. THAT, in a deed, if there be two clauſes ſo totally repugnant to each other, that they cannot ſtand together, the firſt ſhall be received and the latter rejected (n): wherein it differs from a will; for there, of two ſuch repugnant clauſes the latter ſhall ſtand (o). Which is owing to the different natures of the two inſtruments; for the firſt deed, and the laſt will are always moſt available in law. Yet in both caſes we ſhould rather attempt to reconcile them (p).

7. THAT a deviſe be moſt favourably expounded, to purſue if poſſible the will of the deviſor, who for want of advice or learning may have omitted the legal and proper phraſes. And therefore many times the law diſpenſes with the want of words in deviſes, that are abſolutely requiſite in all other inſtruments. Thus a fee may be conveyed without words of inheritance (q); and an eſtate-tail without words of procreation (r). By a will alſo an eſtate may paſs by mere implication, without any expreſs words to direct its courſe. As, where A deviſes lands to his heir at law, after the death of his wife: here, though no eſtate is given to the wife in expreſs terms, yet ſhe ſhall have an eſtate for life by implication (s); for the intent of the teſtator is clearly to poſtpone the heir till after her death; and, if ſhe does not take it, nobody elſe can. So alſo, where a deviſe is of black-acre to A and of white-acre to B in tail, and if they both die without iſſue, then to C in fee: here A and B have *croſs remainders* by implication, and on the failure of either's iſſue, the other or his iſſue ſhall take the whole; and C's remainder over ſhall be poſtponed till the iſſue of both ſhall fail (t). But, to avoid confuſion, no croſs remainders are allowed between more than two deviſees (u): and, in general, where any implications are allowed, they muſt be ſuch as are *neceſſary* (or at

(n) Hardr. 94.
(o) Co. Litt. 112.
(p) Cro. Eliz. 420. 1 Vern. 30.
(q) See pag. 108.
(r) See pag. 115.
(s) 1 Ventr. 376.
(t) Freem. 484.
(u) Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.

leaſt

leaſt highly *probable)* and not merely *poſſible* implications (w). And herein there is no diſtinction between the rules of law and of equity; for the will, being conſidered in both courts in the light of a limitation to uſes (x), is conſtrued in each with equal favour and benignity, and expounded rather on its own particular circumſtances, than by any general rules of poſitive law.

And thus we have taken a tranſient view, in this and the three preceding chapters, of a very large and diffuſive ſubject, the doctrine of common aſſurances: which concludes our obſervations on the *title* to things real, or the means by which they may be reciprocally loſt and acquired. We have before conſidered the *eſtates* which may be had in them, with regard to their duration or quantity of intereſt, the time of their enjoyment, and the number and connexions of the perſons entitled to hold them: we have examined the *tenures*, both antient and modern, whereby thoſe eſtates have been, and are now, holden: and have diſtinguiſhed the object of all theſe enquiries, namely, things real, into the corporeal or ſubſtantial, and incorporeal or ideal *kind*; and have thus conſidered the rights of real property in every light wherein they are contemplated by the laws of England. A ſyſtem of laws, that differs much from every other ſyſtem, except thoſe of the ſame feodal orrigin, in its notions and regulations of landed eſtates; and which therefore could in this particular be very ſeldom compared with any other.

The ſubject, which has thus employed our attention, is of very extenſive uſe, and of as extenſive variety. And yet, I am afraid, it has afforded the ſtudent leſs amuſement and pleaſure in the purſuit, than the matters diſcuſſed in the preceding volume. To ſay the truth, the vaſt alterations which the doctrine of real property has undergone from the conqueſt to the preſent time; the infinite determinations upon points that continually ariſe, and which have been heaped

(w) Vaugh. 262. (x) Fitzg. 236. 11 Mod. 153.

one

one upon another for a courſe of ſeven centuries, without any order or method; and the multiplicity of acts of parliament which have amended, or ſometimes only altered, the common law; theſe caſes have made the ſtudy of this branch of our national juriſprudence a little perplexed and intricate. It hath been my endeavour principally to ſelect ſuch parts of it, as were of the moſt general uſe, where the principles were the moſt ſimple, the reaſons of them the moſt obvious, and the practice the leaſt embarraſſed. Yet I cannot preſume that I have always been thoroughly intelligible to ſuch of my readers, as were before ſtrangers even to the very terms of art, which I have been obliged to make uſe of: though, whenever thoſe have firſt occurred, I have generally attempted a ſhort explication of their meaning. Theſe are indeed the more numerous, on account of the different languages which our law has at different periods been taught to ſpeak; the difficulty ariſing from which will inſenſibly diminiſh by uſe and familiar acquaintance. And therefore I ſhall cloſe this branch of our enquiries with the words of ſir Edward Coke (y): "albeit the ſtudent ſhall not at any one day, do "what he can, reach to the full meaning of all that is here "laid down, yet let him no way diſcourage himſelf, but "proceed; for on ſome other day, in ſome other place," (or perhaps upon a ſecond peruſal of the ſame) "his doubts "will be probably removed."

(y) Proeme to 1 Inſt.

CHAPTER

Chapter the twenty fourth.

Of THINGS PERSONAL.

UNDER the name of things *perſonal* are included all ſorts of things *moveable* which may attend a man's perſon wherever he goes; and therefore being only the objects of the law while they remain within the limits of its juriſdiction, and being alſo of a periſhable quality, are not eſteemed of ſo high a nature, nor paid ſo much regard to by the law, as things that are in their nature more permanent and *immoveable*, as lands, and houſes, and the profits iſſuing thereout. Theſe being conſtantly within the reach, and under the protection of the law, were the principal favourites of our firſt legiſlators: who took all imaginable care in aſcertaining the rights, and directing the diſpoſition, of ſuch property as they imagined to be laſting, and which would anſwer to poſterity the trouble and pains that their anceſtors employed about them; but at the ſame time entertained a very low and contemptuous opinion of all perſonal eſtate, which they regarded only as a tranſient commodity. The amount of it indeed was, comparatively, very trifling, during the ſcarcity of money and the ignorance of luxurious refinements, which prevailed in the feodal ages. Hence it was, that a tax of the *fifteenth*, *tenth*, or ſometimes a much larger proportion, of all the moveables of the ſubject, was frequently laid without ſcruple, and is mentioned with much unconcern by our antient hiſtorians, though now it would juſtly alarm our opulent merchants and ſtockholders. And hence likewiſe may be derived the frequent forfeitures inflicted by

by the common law, of all a man's goods and chattels, for miſbehaviours and inadvertencies that at preſent hardly ſeem to deſerve ſo ſevere a puniſhment. Our antient law-books, which are founded upon the feodal proviſions, do not therefore often condeſcend to regulate this ſpecies of property. There is not a chapter in Britton or the Mirroir, that can fairly be referred to this head; and the little that is to be found in Glanvil, Bracton, and Fleta, ſeems principally borrowed from the civilians. But of later years, ſince the introduction and extenſion of trade and commerce, which are entirely occupied in this ſpecies of property, and have greatly augmented its quantity and of courſe its value, we have learned to conceive different ideas of it. Our courts now regard a man's perſonalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and leſs technical mode of conſidering the one than the other; frequently drawn from the rules which they found already eſtabliſhed by the Roman law, wherever thoſe rules appeared to be well-grounded and appoſite to the caſe in queſtion, but principally from reaſon and convenience, adapted to the circumſtances of the times; preſerving withal a due regard to antient uſages, and a certain feodal tincture, which is ſtill to be found in ſome branches of perſonal property.

BUT things perſonal, by our law, do not only include things *moveable*, but alſo ſomething more. The whole of which is comprehended under the general name of *chattels*, *catalla*; which, Sir Edward Coke ſays (a), is a French word ſignifying goods. And this is true, if underſtood of the Norman dialect; for in the *grand couſtumier* (b), we find the word *chattels* uſed and ſet in oppoſition to a fief or feud: ſo that not only goods, but whatever was not a feud, were accounted chattels. And it is, I apprehend, in the ſame large, extended, negative ſenſe, that our law adopts it; the idea of goods, or moveables only, being not ſufficiently comprehenſive to take in every thing that our law conſiders as a

(a) 1 Inſt. 118. (b) c. 87.

chattel intereſt. For ſince, as the commentator on the *couſtumier* obſerves, there are two requiſites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of theſe qualities is not, according to the Normans, an heritage or fief (c); or, according to us, is not a *real* eſtate: the conſequence of which in both laws is, that it muſt be a perſonal eſtate, or chattel.

CHATTELS therefore are diſtributed by the law into two kinds; chattels *real*, and chattels *perſonal*.

1. CHATTELS *real*, ſaith ſir Edward Coke (d), are ſuch as concern, or ſavour of, the realty; as terms for years of land, wardſhips in chivalry (while the military tenures ſubſiſted) the next preſentation to a church, eſtates by ſtatute-merchant, ſtatute-ſtaple, *elegit*, or the like; of all which we have already ſpoken. And theſe are called real chattels: as being intereſts iſſuing out of, or annexed to real eſtates: of which they have one quality, viz. immobility, which denominates them *real*; but want the other, viz. a ſufficient, legal indeterminate duration: and this want it is, that conſtitutes them *chattels*. The utmoſt period for which they can laſt is fixed and determinate, either for ſuch a ſpace of time certain, or till ſuch a particular ſum of money be raiſed out of ſuch a particular income; ſo that they are not equal in the eye of the law to the loweſt eſtate of freehold, a leaſe for another's life: their tenants were conſidered, upon feodal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have deſtroyed their intereſt, till the reign of Henry VIII (e). A freehold, which alone is a real eſtate, and ſeems (as has been ſaid) to anſwer to the fief in Normandy, is conveyed by corporal inveſtiture and livery of ſeiſin; which gives the tenant ſo ſtrong a hold of the land, that it never after can be wreſted from him

(c) *Cateux ſont meubles et immeubles: ſicomme vrais meubles ſont qui tranſporter ſe peuvent, et enſuivir le corps; immeubles ſont choſes qui ne peuvent enſuivir le corps, nieſtre tranſportees, et tout ce qui n'eſt point en heritage. LL.* Will. Nothi. *c.* 4. *apud* Duireſne. II. 409.

(d) 1 Inſt. 118.

(e) See pag. 141, 142.

during

during his life, but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as in estates *pur auter vie*, and the determinable freehold mentioned in a former chapter (f). And even these, being of an uncertain duration, may by possibility last for the owner's life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life-estate, and therefore a freehold interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it is sure to expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry were sure to expire the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

2. CHATTELS personal are, properly and strictly speaking, things *moveable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household-stuff, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is, that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters which were employed upon real estates: that kind of property

(f) pag. 121.

being of a mongrel amphibious nature, originally endowed with one only of the characteriſtics of each ſpecies of things; the immobility of things real, and the precarious duration of things perſonal.

CHATTEL intereſts being thus diſtinguiſhed and diſtributed, it will be proper to conſider, firſt, the nature of that *property*, or dominion, to which they are liable; which muſt be principally, nay ſolely, referred to perſonal chattels: and, ſecondly, the *title* to that property, or how it may be loſt and acquired. Of each of theſe in its order.

CHAPTER

CHAPTER THE TWENTY-FIFTH.

OF PROPERTY IN THINGS PERSONAL.

PROPERTY, in chattels perſonal, may be either in *poſſeſſion*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or elſe it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of theſe the former, or property in *poſſeſſion*, is divided into two ſorts, an *abſolute* and a *qualified* property.

I. FIRST then of property in *poſſeſſion abſolute*; which is where a man hath, ſolely and excluſively, the right, and alſo the occupation, of any moveable chattels; ſo that they cannot be transferred from him, or ceaſe to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: ſuch alſo may be all *vegetable* productions, as the fruit or other parts, when ſevered from the plant, or the whole plant itſelf, when ſevered from the ground, none of which can be moved out of the owner's poſſeſſion without his own act or conſent, or at leaſt without doing him an injury, which it is the buſineſs of the law to prevent or remedy. Of theſe therefore there remains little to be ſaid.

BUT with regard to *animals*, who have in themſelves a principle and power of motion, and (unleſs particularly confined) can convey themſelves from one part of the world to

another, there is a great difference made with reſpect to their ſeveral claſſes, not only in our law, but in the law of nature and of all civilized nations. They are diſtinguiſhed into ſuch as are *domitae*, and ſuch as are *ferae naturae*; ſome being of a *tame*, and others of a *wild* diſpoſition. In ſuch as are of a nature tame and domeſtic, (as horſes, kine, ſheep, poultry, and the like) a man may have as abſolute a property as in any inanimate beings; becauſe theſe continue perpetually in his occupation, and will not ſtray from his houſe or perſon, unleſs by accident or fraudulent enticement, in either of which caſes the owner does not loſe his property (a): in which our law agrees with the laws of France and Holland (b). The ſtealing, or forcible abduction, of ſuch property as this, is alſo felony; for theſe are things of intrinſic value, ſerving for the food of man, or elſe for the uſes of huſbandry (c). But in animals *ferae naturae* a man can have no abſolute property.

OF all tame and domeſtic animals, the brood belongs to the owner of the dam or mother; the Engliſh law agreeing with the civil, that "*partus ſequitur ventrem*" in the brute creation, though for the moſt part in the human ſpecies it diſallows that maxim. And therefore in the laws of England (d), as well as Rome (e), "*ſi equam meam equus tuus praegnantem fecerit, non eſt tuum ſed meum quod natum eſt.*" And, for this, Puffendorf (f) gives a ſenſible reaſon: not only becauſe the male is frequently unknown; but alſo becauſe the dam, during the time of her pregnancy, is almoſt uſeleſs to the proprietor, and muſt be maintained with greater expence and care: wherefore as her owner is a loſer by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the caſe of young cygnets; which belong equally to the owner of the cock and hen, and ſhall be divided between them (g). But here the reaſons of the

(a) 2 Mod. 319.
(b) *Vin. in Inſt. l. 2. tit. 1. §. 15.*
(c) 1 Hal. P. C. 511, 512.
(d) Bro. *Abr. tit. propertie.* 29.
(e) *Ff. 6. 1. 5.*
(f) L. of N. l. 4. c. 7.
(g) 7 Rep. 17.

general

general rule ceaſe, and "*ceſſante ratione ceſſat et ipſa lex:*" for the male is well known, by his conſtant aſſociation with the female; and for the ſame reaſon the owner of the one doth not ſuffer more diſadvantage, during the time of pregnancy and nurture, than the owner of the other,

II. OTHER animals, that are not of a tame and domeſtic nature, are either not the objects of property at all, or elſe fall under our other diviſion, namely that of *qualified, limited,* or *ſpecial* property: which is ſuch as is not in its nature permanent, but may ſometimes ſubſiſt, and at other times not ſubſiſt. In diſcuſſing which ſubject, I ſhall in the firſt place ſhew, how this ſpecies of property may ſubſiſt in ſuch animals, as are *ferae naturae,* or of a wild nature; and then how it may ſubſiſt in any other things, when under particular circumſtances.

FIRST then, a man may be inveſted with a qualified, but not an abſolute, property in all creatures that are *ferae naturae,* either *per induſtriam, propter impotentiam,* or *propter privilegium.*

1. A QUALIFIED property may ſubſiſt in animals *ferae naturae, per induſtriam hominis:* by a man's *reclaiming* and making them tame by art, induſtry, and education; or by ſo confining them within his own immediate power, that they cannot eſcape and uſe their natural liberty. And under this head ſome writers have ranked all the former ſpecies of animals we have mentioned, apprehending none to be originally and naturally tame, but only made ſo by art and cuſtom: as horſes, ſwine, and other cattle; which, if originally left to themſelves, would have choſen to rove up and down, ſeeking their food at large, and are only made domeſtic by uſe and familiarity, and are therefore, ſay they, called *manſueta, quaſi manui aſſueta.* But however well this notion may be founded, abſtractedly conſidered, our law apprehends the moſt obvious diſtinction to be, between ſuch animals as we generally ſee tame, and are therefore ſeldom, if ever, found wandering at large, which it calls *domitae naturae;*

turae; and ſuch creatures as are uſually found at liberty, which are therefore ſuppoſed to be more emphatically *ferae naturae*, though it may happen that the latter may be ſometimes tamed and confined by the art and induſtry of man. Such as are deer in a park, hares or rabbets in an encloſed warren, doves in a dove-houſe, pheaſants or partridges in a mew, hawks that are fed and commanded by their owner, and fiſh in a private pond or in trunks. Theſe are no longer the property of a man, than while they continue in his keeping or actual poſſeſſion: but if at any time they regain their natural liberty, his property inſtantly ceaſes; unleſs they have *animum revertendi*, which is only to be known by their uſual cuſtom of returning (h). A maxim is borrowed from the civil law (i); "*revertendi animum videntur deſi-*"*nere habere tunc, cum revertendi conſuetudinem deſeruerint.*" The law therefore extends this poſſeſſion farther than the mere manual occupation; for my tame hawk that is purſuing his quarry in my preſence, though he is at liberty to go where he pleaſes, is nevertheleſs my property, for he hath *animum revertendi*. So are my pigeons, that are flying at a diſtance from their home (eſpecially the carrier kind), and likewiſe the deer that is chaſed out of my park or foreſt, and is inſtantly purſued by the keeper or foreſter: all which remain ſtill in my poſſeſſion, and I ſtill preſerve my qualified property in them. But if they ſtray without my knowledge, and do not return in the uſual manner, it is then lawful for any ſtranger to take them (k). But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleaſure; or if a wild ſwan is taken, and marked and turned looſe in the river, the owner's property in him ſtill continues, and it is not lawful for any one elſe to take him (l): but otherwiſe, if the deer has been long abſent without returning, or the ſwan leaves the neighbourhood. Bees alſo are *ferae naturae*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law (m)

(h) Bracton. l. 2. c. 1. 7 Rep. 17.
(i) *Inſt.* 2. 1. 15.
(k) Finch. L. 177.
(l) Crompt. of courts. 167. 7 Rep. 16.
(m) Puff. l. 4. c. 6. §. 5. *Inſt.* 2. 1. 14.

And

And to the ſame purpoſe, not to ſay the ſame words, with the civil law, ſpeaks Bracton (n): occupation, that is, hiving or including them, gives the property in bees: for, though a ſwarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their neſts thereon; and therefore if another hives them, he ſhall be their proprietor; but a ſwarm, which fly from and out of my hive, are mine ſo long as I can keep them in ſight, and have power to purſue them; and in theſe circumſtances no one elſe is entitled to take them. But it hath been alſo ſaid (o), that with us the only ownerſhip in bees is *ratione ſoli*; and the charter of the foreſt (p), which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in conſideration of the property of the ſoil whereon they are found.

IN all theſe creatures, reclaimed from the wildneſs of their nature, the property is not abſolute, but defeaſible: a property, that may be deſtroyed if they reſume their antient wildneſs, and are found at large. For if the pheaſants eſcape from the mew, or the fiſhes from the trunk, and are ſeen wandering at large in their proper element, they become *ferae naturae* again; and are free and open to the firſt occupant that has ability to ſeiſe them. But while they thus continue my qualified or defeaſible property, they are as much under the protection of the law, as if they were abſolutely and indefeaſibly mine: and an action will lie againſt any man that detains them from me, or unlawfully deſtroys them. It is alſo as much felony by common law to ſteal ſuch of them as are fit for food, as it is to ſteal tame animals (q): but not ſo, if they are only kept for pleaſure, curioſity, or whim, as dogs, bears, cats, apes, parrots, and ſinging birds (r); becauſe their value is not intrinſic, but depending only on the caprice of the owner (s): though it is ſuch

(n) *l.* 2. *c.* 1. §. 3.
(o) Bro. *Abr. tit. Propertie.* 37. cites 43 Edw. III. 24.
(p) 9 Hen. III. c. 13.
(q) 1 Hal. P. C. 512.
(r) Lamb. Eiren. 275.
(s) 7 Rep. 18. 3 Inſt. 109.

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an invaſion of property as may amount to a civil injury, and be redreſſed by a civil action (t). Yet to ſteal a reclaimed hawk is felony both by common law and ſtatute (u); which ſeems to be a relick of the tyranny of our antient ſportſmen. And, among our elder anceſtors the antient Britons, another ſpecies of reclaimed animals, *viz.* cats, were looked upon as creatures of intrinſic value; and the killing or ſtealing one was a grievous crime, and ſubjected the offender to a fine; eſpecially if it belonged to the king's houſehold, and were the *cuſtos horrei regii*, for which there was a very peculiar forfeiture (w). And thus much of qualified property in wild animals, reclaimed *per induſtriam*.

2. A QUALIFIED property may alſo ſubſiſt with relation to animals *ferae naturae, ratione impotentiae*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their neſts or burrows in my land, and have young ones there; I have a qualified property in thoſe young ones, till ſuch time as they can fly, or run away, and then my property expires (x): but, till then it is in ſome caſes treſpaſs, and in others felony, for a ſtranger to take them away (y). For here, as the owner of the land has it in his power to do what he pleaſes with them, the law therefore veſts a property in him of the young ones, in the ſame manner as it does of the old ones if reclaimed and confined: for theſe cannot through weakneſs, any more than the others through reſtraint, uſe their natural liberty and forſake him.

3. A MAN may, laſtly, have a qualified property in animals *ferae naturae, propter privilegium:* that is, he may have the privilege of hunting, taking, and killing them, in

(t) Bro. *Abr. tit. Treſpaſs.* 407.

(u) 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.

(w) "*Si quis felem, horrei regii* "*cuſtodem, occiderit vel furto abſtu-* "*lerit, felis ſumma cauda ſuſpenda-* "*tur, capite aream attingente, et in* "*eam grana tritici effundantur, uſ-* "*quedum ſummitas caudae tritico co-* "*operiatur.*" Wotton. *LL. Wall. l.* 3. *c.* 5. §. 5. An amercement ſimilar to which, ſir Edward Coke tells us (7 Rep. 18.) there antiently was for ſtealing ſwans; only ſuſpending them by the beak, inſtead of the tail.

(x) *Carta de foreſt.* 9 Hen. III. c. 13.

(y) 7 Rep. 17 Lamb. Eiren. 274.

excluſion

excluſion of other perſons. Here he has a tranſient property in theſe animals, uſually called game, ſo long as they continue within his liberty (z); and may reſtrain any ſtranger from taking them therein: but the inſtant they depart into another liberty, this qualified property ceaſes. The manner, in which this privilege is acquired, will be ſhewn in a ſubſequent chapter.

THE qualified property which we have hitherto conſidered extends only to animals *ferae naturae*, when either reclaimed, impotent, or privileged. Many other things may alſo be the objects of qualified property. It may ſubſiſt in the very elements, of fire or light, of air, and of water. A man can have no abſolute permanent property in theſe, as he may in the earth or land; ſince theſe are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownerſhip, which laſts ſo long as they are in actual uſe and occupation, but no longer. If a man diſturbs another, and deprives him of the lawful enjoyment of theſe; if one obſtructs another's antient windows (a), corrupts the air of his houſe or gardens (b), fouls his water (c), or unpens and lets it out, or if he diverts an antient watercourſe that uſed to run to the other's mill or meadow (d); the law will animadvert hereon as an injury, and protect the party injured in his poſſeſſion. But the property in them ceaſes the inſtant they are out of poſſeſſion: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own uſe.

THESE kinds of qualification in property depend upon the peculiar circumſtances of the ſubject matter, which is not capable of being under the abſolute dominion of any proprietor. But property may alſo be of a qualified or ſpecial nature, on account of the peculiar circumſtances of the owner, when the thing itſelf is very capable of abſolute ownerſhip.

(z) Cro. Car. 554. Mar. 48. 5. Mod. 376. 12 Mod. 144.
(a) 9 Rep. 58.
(b) *Ibid.* 59. Lutw. 92.
(c) 9 Rep. 59.
(d) 1 Leon. 273. Skinn. 389.

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As in caſe of *bailment*, or delivery, of goods to another perſon for a particular uſe; as to a carrier to convey to London, to an innkeeper to ſecure in his inn, or the like. Here there is no abſolute property in either the bailor or the bailee, the perſon delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate poſſeſſion; the bailee hath the poſſeſſion, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in caſe the goods be damaged or taken away: the bailee, on account of his immediate poſſeſſion; the bailor, becauſe the poſſeſſion of the bailee is, mediately, his poſſeſſion alſo (e). So alſo in caſe of goods pledged or pawned upon condition, either to repay money or otherwiſe; both the pledgor and pledgee have a qualified, but neither of them an abſolute, property therein: the pledgor's property is conditional, and depends upon the performance of the condition of re-payment, *&c*; and ſo too is that of the pledgee, which depends upon its non-performance (f). The ſame may be ſaid of goods diſtreined for rent, or other cauſe of diſtreſs: which are in the nature of a pledge, and are not, at the firſt taking, the abſolute property of either the diſtreinor, or party diſtreined; but may be redeemed, or elſe forfeited, by the ſubſequent conduct of the latter. But a ſervant, who hath the care of his maſter's goods or chattels, as a butler of plate, a ſhepherd of ſheep, and the like, hath not any property or poſſeſſion either abſolute or qualified, but only a mere charge or overſight (g).

HAVING thus conſidered the ſeveral diviſions of property in *poſſeſſion*, which ſubſiſts there only, where a man hath both the right and alſo the occupation of the thing; we will proceed next to take a ſhort view of the nature of property in *action*, or ſuch where a man hath not the occupation, but merely a bare right to occupy the thing in queſtion; the poſſeſſion whereof may however be recovered by a ſuit or action

(e) 1 Roll. Abr. 607.
(f) Cro. Jac. 245.
(g) 3 Inſt. 108.

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at law: from whence the thing ſo recoverable is called a thing, or *choſe, in action* (h). Thus money due on a bond is a *choſe* in action; for the property in a debt veſts at the time of forfeiture mentioned in the obligation, but there is no poſſeſſion till recovered by courſe of law. If a man promiſes, or covenants with me, to do any act, and fails in it, whereby I ſuffer damage; the recompence for this damage is a *choſe* in action; for though a right to ſome recompence veſts in me, at the time of the damage done, yet what and how large ſuch recompence ſhall be, can only be aſcertained by verdict: and the poſſeſſion can only be given me by legal judgment and execution. In the former of theſe caſes the ſtudent will obſerve, that the property, or right of action, depends upon an *expreſs* contract or obligation to pay a ſtated ſum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he ſhall pay me the damages I ſuſtain by this breach of covenant. And hence it may be collected, that all property in action depends entirely upon contracts, either expreſs or implied; which are the only regular means of acquiring a *choſe* in action, and of the nature of which we ſhall diſcourſe at large in a ſubſequent chapter.

AT preſent we have only to remark, that upon all contracts or promiſes, either expreſs or implied, and the infinite variety of caſes into which they are and may be ſpun out, the law gives an action of ſome ſort or other to the party injured in caſe of non-performance; to compel the wrongdoer to do juſtice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a ſatisfaction equivalent to the damage ſuſtained. But while the thing, or its equivalent, remains in ſuſpenſe, and the injured party has only the right and not the occupation, it is called a *choſe* in action; being a thing ra-

(h) The ſame idea, and the ſame denomination, of property prevailed in the civil law. "*Rem in bonis noſtris* "*habere intelligimur, quotiens ad re-* "*ciperandam eam actionem habea-* "*mus.*" (*Ff.* 41. 1. 52.) And again: "*aeque bonis adnumerabitur etiam, ſi* "*quid eſt in actionibus, petitionibus,* "*perſecutionibus. Nam et haec in bonis* "*eſſe videntur.*" (*Ff.* 50. 16. 49.)

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ther *in potentia* than *in eſſe*: though the owner may have as abſolute a property of ſuch things in action, as of things in poſſeſſion.

And, having thus diſtinguiſhed the different *degree* or *quantity* of *dominion* or *property* to which things perſonal are ſubject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before obſerved in treating of the property of things real.

First, as to the *time* of *enjoyment*. By the rules of the antient common law, there could be no future property, to take place in expectancy, created in perſonal goods and chattels; becauſe, being things tranſitory, and by many accidents ſubject to be loſt, deſtroyed, or otherwiſe impaired, and the exigencies of trade requiring alſo a frequent circulation thereof, it would occaſion perpetual ſuits and quarrels, and put a ſtop to the freedom of commerce, if ſuch limitations in remainder were *generally* tolerated and allowed. But yet in laſt wills and teſtaments ſuch limitations of perſonal goods and chattels, in remainder after a bequeſt for life, were permitted (i): though originally that indulgence was only ſhewn, when merely the *uſe* of goods, and not the goods themſelves, was given to the firſt legatee (k); the property being ſuppoſed to continue all the time in the executor of the deviſor. But now that diſtinction is diſregarded: and therefore if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But, where an eſtate-tail in things perſonal is given to the firſt or any ſubſequent poſſeſſor, it veſts in him the total property, and no remainder over ſhall be permitted on ſuch a limitation (m). For this, if allowed, would tend to a perpetuity, as the deviſee or grantee in tail of a chattel has no method of barring the entail; and therefore the law veſts in him at once the entire dominion of the

(i) 1 Equ. Caſ. abr. 360.
(k) Mar. 106.
(l) 2 Freem. 206.
(m) 1 P. Wms. 290.

goods,

goods, being analogous to the fee-ſimple which a tenant in tail may acquire in a real eſtate.

NEXT, as to the *number* of *owners*. Things perſonal may belong to their owners, not only in ſeveralty, but alſo in joint-tenancy, and in common, as well as real eſtates. They cannot indeed be veſted in coparcenary; becauſe they do not deſcend from the anceſtor to the heir, which is neceſſary to conſtitute coparceners. But if a horſe, or other perſonal chattel, be given to two or more, abſolutely, they are joint-tenants hereof; and, unleſs the jointure be ſevered, the ſame doctrine of ſurvivorſhip ſhall take place as in eſtates of lands and tenements (n). And, in like manner, if the jointure be ſevered, as by either of them ſelling his ſhare, the vendee and the remaining part-owner ſhall be tenants in common, without any *jus accreſcendi* or ſurvivorſhip (o). So alſo if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common (p); as, we have formerly ſeen (q), the ſame words would have done, in regard to real eſtates. But, for the encouragement of huſbandry and trade, it is held that a ſtock on a farm, though occupied jointly, and alſo a ſtock uſed in a joint undertaking, by way of partnerſhip in trade, ſhall always be conſidered as common and not as joint property; and there ſhall be no ſurvivorſhip therein (r).

(n) Litt. §. 282. 1 Vern. 482.
(o) Litt. §. 321.
(p) 1 Equ. Caſ. abr. 292.
(q) pag. 193.
(r) Vern. 217. Co. Litt. 182.

CHAPTER

CHAPTER THE TWENTY SIXTH.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

WE are next to conſider the *title* to things perſonal, or the various means of *acquiring*, and of *loſing*, ſuch property as may be had therein: both which conſiderations of gain and loſs ſhall be blended together in one and the ſame view, as was done in our obſervations upon real property; ſince it is for the moſt part impoſſible to contemplate the one, without contemplating the other alſo. And theſe methods of acquiſition or loſs are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By cuſtom. 5. By ſucceſſion. 6. By marriage. 7. By judgment. 8. By gift. 9. By contract. 10. By bankruptcy. 11. By teſtament. 12. By adminiſtration.

AND, firſt, a property in goods and chattels may be acquired by *occupancy:* which, we have more than once (a) remarked, was the original and only primitive method of acquiring any property at all; but which has ſince been reſtrained and abridged, by the poſitive laws of ſociety, in order to maintain peace and harmony among mankind. For this purpoſe, by the laws of England, gifts and contracts, teſtaments, legacies, and adminiſtrations have been introduced and countenanced, in order to transfer and continue that property and poſſeſſion

(a) See pag. 3. 8. 258.

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in things perſonal, which has once been acquired by the owner. And where ſuch things are found without any other owner, they for the moſt part belong to the king by virtue of his prerogative; except in ſome few inſtances, wherein the original and natural right of occupancy is ſtill permitted to ſubſiſt, and which we are now to conſider.

1. THUS, in the firſt place, it hath been ſaid, that any body may ſeiſe to his own uſe ſuch goods as belong to an alien enemy (b). For ſuch enemies, not being looked upon as members of our ſociety, are not entitled during their ſtate of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to ſeiſe upon their chattels, without being compelled as in other caſes to make reſtitution or ſatisfaction to the owner. But this, however generally laid down by ſome of our writers, muſt in reaſon and juſtice be reſtrained to ſuch captors as are authorized by the public authority of the ſtate, reſiding in the crown (c); and to ſuch goods as are brought into this country by an alien enemy, after a declaration of war, without a ſafe-conduct or paſſport. And therefore it hath been held (d), that where a foreigner is reſident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be ſeiſed. It hath alſo been adjudged, that if an enemy take the goods of an Engliſhman, which are afterwards retaken by another ſubject of this kingdom, the former owner ſhall loſe his property therein, and it ſhall be indefeaſibly veſted in the ſecond taker; unleſs they were retaken the ſame day, and the owner before ſun-ſet puts in his claim of property (e).

Which is agreeable to the law of nations, as underſtood in the time of Grotius (f), even with regard to captures made at ſea; which were held to be the property of the captors after a poſſeſſion of twenty-four hours: though the modern authorities (g) require, that before the property

(b) Finch. L. 178.
(c) Freem. 40.
(d) Bro. *Abr. tit. prerogtive.* 38. *forfeiture.* 57.
(e) *Ibid.*
(f) *de. j. b. & p. l.* 3. *c.* 6. §. 3.
(g) Bynkerſh. *quaeſt. jur. publ. l.* 4. Roec. *de Aſſecur. nat.* 66.

can be changed, the goods muſt have been brought into port, and have continued a night *intra praeſidia*, in a place of ſafe cuſtody, ſo that all hope of recovering them is loſt.

AND, as in the *goods* of an enemy, ſo alſo in his *perſon*, a man may acquire a ſort of qualified property, by taking him a priſoner in war (h); at leaſt till his ranſom be paid (j). And this doctrine ſeems to have been extended to negro-ſervants (i), who are purchaſed, when captives, of the nations with whom they are at war, and continue therefore in ſome degree the property of their maſters who buy them: though, accurately ſpeaking, that property conſiſts rather in the perpetual *ſervice*, than in the *body* or *perſon*, of the captive (k).

2. THUS again, whatever moveables are found upon the ſurface of the earth, or in the ſea, and are unclaimed by any owner, are ſuppoſed to be abandoned by the laſt proprietor; and, as ſuch, are turned into the common ſtock and maſs of things: and therefore they belong, as in a ſtate of nature, to the firſt occupant or fortunate finder, unleſs they fall within the deſcription of waifs, or eſtrays, or wreck, or hidden treaſure; for theſe, we have formerly ſeen (l), are veſted by law in the king, and form a part of the ordinary revenue of the crown.

3. THUS too the benefit of the elements, the light, the air, and the water, can only be *appropriated* by occupancy. If I have an antient window overlooking my neighbour's ground, he may not erect any blind to obſtruct the light: but if I build my houſe cloſe to his wall, which darkens it, I cannot compel him to demoliſh his wall; for there the firſt occupancy is rather in him, than in me. If my neighbour makes a tan-yard, ſo as to annoy and render leſs ſalubrious the air of

Bro. *Abr. tit. propertie.* 18.

(j) We meet with a curious writ of treſpaſs in the regiſter (102.) for breaking a man's houſe, and ſetting ſuch a priſoner at large. "*Quare domum ipſius A. apud W. (in qua idem A. quendum H. Scotum per ipſum A. de guerra captum tanquam priſonem ſuum, quouſque ſibi de centum libris, per quas idem H. redemptionem ſuam cum praefato A pro vita ſua ſalvanda ferat, ſatisfactum foret, detinuit) fregit, et ipſum H. cepit et abduxit, vel quo voluit abire permiſit, &c.*"

(i) 2 Lev. 201.

(k) Carth. 396. Ld. Raym. 147 Salk. 667.

(l) Book I. ch. 8.

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my houſe or gardens, the law will furniſh me with a remedy; but if he is firſt in poſſeſſion of the air, and I fix my habitation near him, the nuiſance is of my own ſeeking, and muſt continue. If a ſtream be unoccupied, I may erect a mill thereon, and detain the water; yet not ſo as to injure my neighbour's prior mill, or his meadow: for he hath by the firſt occupancy acquired a property in the current.

4. WITH regard likewiſe to animals *ferae naturae*, all mankind had by the original grant of the creator a right to purſue and take any fowl or inſect of the air, any fiſh or inhabitant of the waters, and any beaſt or reptile of the field: and this natural right ſtill continues in every individual, unleſs where it is reſtrained by the civil laws of the country. And when a man has once ſo ſeiſed them, they become while living his *qualified* property, or, if dead, are *abſolutely* his own: ſo that to ſteal them, or otherwiſe invade this property, is, according to the reſpective values, ſometimes a criminal offence, ſometimes only a civil injury. The reſtrictions which are laid upon this right, by the laws of England, relate principally to royal fiſh, as whale and ſturgeon, and ſuch terreſtrial, aërial, or aquatic animals as go under the denomination of *game*; the taking of which is made the excluſive right of the prince, and ſuch of his ſubjects to whom he has granted the ſame royal privilege. But thoſe animals, which are not expreſsly ſo reſerved, are ſtill liable to be taken and appropriated by any of the king's ſubjects, upon their own territories; in the ſame manner as they might have taken even game itſelf, till theſe civil prohibitions were iſſued: there being in nature no diſtinction between one ſpecies of wild animals and another, between the right of acquiring property in a hare or a ſquirrel, in a partridge or a butterfly; but the difference, at preſent made, ariſes merely from the poſitive municipal law.

5. To this principle of occupancy alſo muſt be referred the method of acquiring a ſpecial perſonal property in corn growing on the ground, or other *emblements*, by any *poſſeſſor* of

the land who hath ſown or planted it, whether he be owner of the inheritance in fee or in tail, or be tenant for life, for years, or at will: which emblements are diſtinct from the real eſtate in the land, and ſubject to many, though not all, the incidents attending perſonal chattels. They were deviſable by teſtament before the ſtatute of wills (m), and at the death of the owner ſhall veſt in his executor and not his heir: they are forfeitable by outlawry in a perſonal action (n): and by the ſtatute 11 Geo. II. c. 19. though not by the common law (o), they may be diſtreined for rent arrere. The reaſon for admitting the acquiſition of this ſpecial property, by tenants who have temporary intereſts, was formerly given (p), and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are aſſets in the hands of the executor, are forfeitable upon outlawry, and diſtreinable for rent, they are not in other reſpects conſidered as perſonal chattels; and, particularly, they are not the object of larciny, before they are ſevered from the ground (q).

6. THE doctrine of property ariſing from *acceſſion* is alſo grounded on the right of occupancy. By the Roman law, if any given corporeal ſubſtance received afterwards an acceſſion by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the converſion of wood or metal into veſſels and utenſils, the original owner of the thing was intitled by his right of poſſeſſion to the property of it under ſuch its ſtate of improvement (r): but if the thing itſelf, by ſuch operation, was changed into a different ſpecies, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a ſatisfaction to the former proprietor for the materials, which he had ſo converted (s). And theſe doctrines are implicitly copied and adopted by our Bracton (t), in the reign of King

(m) Perk. §. 512.
(n) Bro *Abr. tit. emblements.* 21. 5 Rep. 116.
(o) 1 Roll. Abr. 665.
(p) page 122. 146.
(q) 3 Inſt. 109.
(r) *Inſt.* 2. 1. 25. 26. 31. *Ff.* 6. 1. 5.
(s) *Inſt.* 2. 1. 25, 34.
(t) *l.* 2. *c.* 2 & 3.

Henry

Henry III; and have ſince been confirmed by many reſolutions of the courts (u). It hath even been held, that if one takes away another's wife or ſon, and cloaths them, afterwards the huſband or father retakes them back, the garments ſhall ceaſe to be the property of him who provided them, being now annexed to the perſon of the child or woman (w).

7. BUT in the caſe of *confuſion* of goods, where thoſe of two perſons are ſo intermixed, that the ſeveral portions can be no longer diſtinguiſhed, the Engliſh law partly agrees with, and partly differs from, the civil. If the intermixture be by conſent, I apprehend that in both laws the proprietors have an intereſt in common, in proportion to their reſpective ſhares (x). But, if one wilfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or caſts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the ſole property of the whole to him who has not interfered in the mixture, yet allows a ſatisfaction to the other for what he has ſo improvidently loſt (y). But our law, to guard againſt fraud, allows no remedy in ſuch a caſe; but gives the intire property, without any account, to him, whoſe original dominion is invaded, and endeavoured to be rendered uncertain, without his own conſent (z).

8. THERE is ſtill another ſpecies of property, which being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; ſince the right of occupancy itſelf is ſuppoſed by Mr. Locke (a), and many others (b), to be founded on the perſonal labour of the occupant. And this is the right, which an author may be ſuppoſed to have in his own original literary compoſitions: ſo that no other perſon without his leave may publiſh or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he has clearly a right

(u) Bro. *Abr. tit. propertie.* 23. Moor. 20. Poph. 38.
(w) Moor. 214.
(x) *Inſt.* 2. 1. 27, 28. 1 Vern. 217.
(y) *Inſt.* 2. 1. 28.
(z) Poph. 38. 2 Bulſtr. 325. 2. Vern. 516.
(a) on Gov. part 2. ch. 5.
(b) See page 8.

to diſpoſe of that identical work as he pleaſes, and any attempt to take it from him, or vary the diſpoſition he has made of it, is an invaſion of his right of property. Now the identity of a literary compoſition conſiſts intirely in the *ſentiment* and the *language*; the ſame conceptions, cloathed in the ſame words, muſt neceſſarily be the ſame compoſition: and whatever method be taken of conveying that compoſition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is ſo conveyed; and no other man can have a right to convey or transfer it without his conſent, either tacitly or expreſsly given. This conſent may perhaps be tacitly given, when an author permits his work to be publiſhed, without any reſerve of right, and without ſtamping on it any marks of ownerſhip: it is then a preſent to the public, like the building of a church, or the laying out a new highway: but, in caſe of a bargain for a ſingle impreſſion, or a ſale or gift of the copyright, the reverſion is plainly continued in the original proprietor, or the whole property transferred to another.

THE Roman law adjudged, that if one man wrote any thing, though never ſo elegantly, on the paper or parchment of another, the writing ſhould belong to the original owner of the materials on which it was written (c): meaning certainly nothing more thereby, than the mere mechanical operation of writing, for which it directed the ſcribe to receive a ſatisfaction; eſpecially as, in works of genius and invention, ſuch as a picture painted on another man's canvas, the ſame law (d) gave the canvas to the painter. We find no other mention in the civil law of any property in the works of the underſtanding, though the ſale of literary copies, for the purpoſe of recital or multiplication, is certainly as antient as the times of Terence (e), Martial (f), and Statius (g).

(c) *Si in chartis membraniſve tuis carmen vel hiſtoriam vel orationem Titius ſcripſerit, hujus corporis non Titius ſed tu dominus eſſe videris. Inſt.* 2. 1. 33.

(d) *Ibid.* §. 34.

(e) *Prol. in Eunuch.* 20.

(f) *Epigr.* i. 67. iv. 72. xiii. 3. xiv. 194.

(g) *Juv.* vii. 83.

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Neither with us in England hath there been any direct determination upon the right of authors at the common law. But much may be gathered from the frequent injunctions of the court of chancery, prohibiting the invaſion of this property: eſpecially where either the injunctions have been *perpetual* (h), or have related to unpubliſhed manuſcripts (i), or to ſuch antient books, as were not within the proviſions of the ſtatute of queen Anne (k). Much may alſo be collected from the ſeveral legiſlative recognitions of copyrights (l); and from thoſe adjudged caſes at common law, wherein the crown hath been conſidered as inveſted with certain prerogative copyrights (m); for, if the crown is capable of an excluſive right in any one book, the ſubject ſeems alſo capable of having the ſame right in another.

BUT, excluſive of ſuch copyright as may ſubſiſt by the rules of the common law, the ſtatute 8 Ann. c. 19. hath protected by additional penalties the property of authors and their aſſigns for the term of fourteen years; and hath directed that if, at the end of that term, the author himſelf be living, the right ſhall then return to him for another term of the ſame duration: and a ſimilar privilege is extended to the inventors of prints and engravings, for the term of fourteen years, by the ſtatute 8 Geo. 2. c. 13. Both which appear to have been copied from the exception in the ſtatute of monopolies, 21 Jac. I. c. 3. which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the ſole working or making of the ſame; by virtue whereof a temporary property becomes veſted in the patentee (n). And the ſtatute 12 Geo. II. c. 36. hath alſo ſuperadded other penalties and forfeitures, in caſe any book firſt compoſed or written, and printed in Great Britain, ſhall be reprinted abroad, and imported for ſale into this kingdom.

(h) Knaplock v. Curl. 9 Nov. 1722. Viner Abr. *tit. Books.* pl. 3.—Baller v. Watſon. 6 Dec. 1737.

(i) Webb v. Roſe. 24 May 1732.—Pope v. Curl. 5 Jun. 1741.—Forreſter v. Waller. 13 Jun. 1741.—Duke of Queenſbury v. Shebbeare. 31 July 1758.

(k) Knaplock v. Curl. before cited —Eyre v. Walker. 9 Jun. 1735.—Motte v. Faulkner. 28 Nov. 1735.—Walthoe v. Walker. 27 Jan. 1736.—Tonſon v. Walker. 12 May 1739. and 30 Apr. 1752.

(l) *A. D.* 1649. c. 60 Scobell. 92. 13. & 14 Car. II. c. 33. 10 Ann. c. 19. §. 112. 5 Geo III. c. 12. §. 26.

(m) Cart. 89. 1 Mod. 257. 4 Burr. 661.

(n) 1 Vern. 62.

CHAPTER THE TWENTY SEVENTH.

OF TITLE BY PREROGATIVE, AND FORFEITURE.

A SECOND method of acquiring property in perſonal chattels is by the *king's prerogative:* whereby a right may accrue either to the crown itſelf, or to ſuch as claim under the title of the crown, as by grant or by preſcription.

SUCH in the firſt place are all *tributes*, *taxes*, and *cuſtoms*; whether conſtitutionally inherent in the crown, as flowers of the prerogative and branches of the *cenſus regalis* or antient royal revenue, or whether they be occaſionally created by authority of parliament; of both which ſpecies of revenue we treated largely in the former volume. In theſe the king acquires and the ſubject loſes a property the inſtant they become due: if paid, they are a *choſe* in poſſeſſion; if unpaid, a *choſe* in action. Hither alſo may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his antient prerogative, or by particular modern ſtatutes: which revenues created by ſtatute do always aſſimilate, or take the ſame nature, with the antient revenues; and may therefore be looked upon as ariſing from a kind of artificial or ſecondary prerogative. And, in either caſe, the owner of the thing forfeited, and the perſon fined or amerced, do loſe and part with the property of the forfeiture, fine, or amercement, the inſtant the king or his grantee acquires it.

IN

IN theſe ſeveral methods of acquiring property by prerogative there is alſo this peculiar quality, that the king cannot have a *joint* property with any perſon in one entire chattel, or ſuch a one as is not capable of diviſion or ſeparation; but where the titles of the king and a ſubject concur, the king ſhall have the whole: in like manner as the king can, neither by grant nor contract, become a joint-tenant of a chattel real with another perſon (a); but by ſuch grant or contract ſhall become intitled to the whole in ſeveralty. Thus, if a horſe be given to the king and a private perſon, the king ſhall have the ſole property: if a bond be made to the king and a ſubject, the king ſhall have the whole penalty; the debt or duty being one ſingle chattel (b): and ſo, if two perſons have the property of a horſe between them, or have a joint debt owing them on bond, and one of them aſſigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king ſhall have the entire horſe, and the entire debt (c). For, as it is not conſiſtent with the dignity of the crown to be partner with a ſubject, ſo neither does the king ever loſe his right in any inſtance; but, where they interfere, his is always preferred to that of another perſon (d): from which two principles it is a neceſſary conſequence, that the innocent, though unfortunate, partner, muſt loſe his ſhare in both the debt and the horſe, or in any other chattel in the ſame circumſtances.

THIS doctrine has no opportunity to take place in certain other inſtances of title by prerogative, that remain to be mentioned; as the chattels thereby veſted are originally and ſolely veſted in the crown, without any transfer or derivative aſſignment either by deed or law from any former proprietor. Such is the acquiſition of property in wreck, in treaſure-trove, in waifs, in eſtrays, in royal fiſh, in ſwans, and the like; which are not *transferred* to the ſovereign from any

(a) See page 184.
(b) Fitz. *Abr. t. dette.* 38. Plowd. 243.
(c) Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.
(d) Co. Litt. 30.

former

former owner, but are originally *inherent* in him by the rules of law, and are derived to particular ſubjects, as royal franchiſes, by his bounty. Theſe are aſcribed to him, partly upon the particular reaſons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia*, and therefore veſted in the king, as well to preſerve the peace of the public, as in truſt to employ them for the ſafety and ornament of the commonwealth.

WITH regard to the prerogative *copyrights*, which were mentioned in the preceding chapter, they are held to be veſted in the crown upon different reaſons. Thus, 1. The king, as the executive magiſtrate, has the right of promulging to the people all acts of ſtate and government. This gives him the excluſive privilege of printing, at his own preſs, or that of his grantees, all *acts of parliament*, *proclamations*, and *orders of council*. 2. As ſupreme head of the church, he hath a right to the publication of all *liturgies* and books of *divine ſervice*. 3. He hath a right by purchaſe to the copies of ſuch *law-books*, *grammars*, and other compoſitions, as were compiled or tranſlated at the expence of the crown. And upon theſe two laſt principles the excluſive right of printing the tranſlation of the *bible* is founded. 4. *Almanacks* have been ſaid to be prerogative-copies, either as things derelict, or elſe as being ſubſtantially nothing more than the calendar prefixed to our liturgy (e). And indeed the regulation of time has been often conſidered as a matter of ſtate. The Roman *faſti* were under the care of the pontifical college: and Romulus, Numa, and Julius Cæſar, ſucceſſively regulated the Roman calendar.

THERE ſtill remains another ſpecies of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of ſuch animals *ferae naturae*, as are known by the denomination of *game*, with the right of purſuing, taking, and deſtroying them: which is veſted in the king alone, and from him derived to

(e) 1 Mod. 257.

ſuch

ſuch of his ſubjects as have received the grants of a chaſe, a park, a free warren, or free fiſhery. This may lead us into an enquiry concerning the original of theſe franchiſes, or royalties, on which we touched a little in a former chapter (f); the right itſelf being an incorporeal hereditament, though the fruits and profits of it are of a perſonal nature.

IN the firſt place then we have already ſhewn, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peaſant, has an equal right of purſuing, and taking to his own uſe, all ſuch creatures as are *ferae naturae*, and therefore the property of no body, but liable to be ſeiſed by the firſt occupant. And ſo it was held by the imperial law, even ſo late as Juſtinian's time: "*ferae igitur* "*beſtiae, et volucres, et omnia animalia quae mari, coelo, et ter-*"*ra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gen-*"*tium ſtatim illius eſſe incipiunt. Quod enim nullius eſt, id na-*"*turali ratione occupanti conceditur* (g)." But it follows from the very end and conſtitution of ſociety, that this natural right, as well as many others belonging to man as an individual, may be reſtrained by poſitive laws enacted for reaſons of ſtate, or for the ſuppoſed benefit of the community. This reſtriction may be either with reſpect to the *place* in which this right may, or may not, be exerciſed; with reſpect to the *animals* that are the ſubject of this right; or with reſpect to the *perſons* allowed or forbidden to exerciſe it. And, in conſequence of this authority, we find that the municipal laws of many nations have exerted ſuch power of reſtraint; have in general forbidden the entering on another man's grounds, for any cauſe, without the owner's leave; have extended their protection to ſuch particular animals as are uſually the objects of purſuit; and have inveſted the prerogative of hunting and taking ſuch animals in the ſovereign of the ſtate only, and ſuch as he ſhall authorize (h). Many reaſons have concurred for making theſe conſtitutions: as, 1. For the encouragement of agriculture and improvement of lands, by giving every man an excluſive dominion over his

(f) pag. 38. 39.
(g) *Inſt.* 2. 1. 12.
(h) Puff. L. N. l. 4. c. 6. §. 5.

own

own ſoil. 2. For preſervation of the ſeveral ſpecies of theſe animals which would ſoon be extirpated by a general liberty. 3. For prevention of idleneſs and diſſipation in huſbandmen, artificers, and others of lower rank; which would be the unavoidable conſequence of univerſal licence. 4. For preventing of popular inſurrections and reſiſtance to the government by diſarming the bulk of the people (i): which laſt is a reaſon oftener meant, than avowed, by the makers of foreſt, or game laws. Nor, certainly, in theſe prohibitions is there any *natural* injuſtice, as ſome have weakly enough ſuppoſed: ſince, as Puffendorf obſerves, the law does not hereby take from any man his preſent property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of ſociety have in moſt inſtances very juſtly and reaſonably deprived him.

YET, however defenſible theſe proviſions in general may be, on the footing of reaſon, or juſtice, or civil policy, we muſt notwithſtanding acknowlege that, in their preſent ſhape, they owe their immediate original to ſlavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibition, than that natural one of not ſporting on any private grounds without the owner's leave; and another of a more ſpiritual nature, which was rather a rule of eccleſiaſtical diſcipline, than a branch of municipal law. The Roman or civil law, though it knew no reſtriction as to *perſons* or *animals*, ſo far regarded the article of *place*, that it allowed no man to hunt or ſport upon another's ground, but by conſent of the owner of the ſoil. "*Qui alienum fundum ingreditur, venandi aut aucupandi* "*gratia, poteſt a domino prohiberi ne ingrediatur* (k)." For if there can, by the law of nature, be any inchoate imperfect property ſuppoſed in wild animals before they are taken, it ſeems moſt reaſonable to fix it in him upon whoſe land they are found. And as to the other reſtriction, which relates to *perſons* and not

(i) Warburton's alliance. 324. (k) *Inſt.* 2. 1. §. 12.

to

to *place*, the pontifical or canon law (l) interdicts "*venationes, et ſylvaticas vagationes cum canibus, et accipitribus*" to all *clergymen* without diſtinction; grounded on a ſaying of St. Jerom (m), that it never is recorded that theſe diverſions were uſed by the ſaints, or primitive fathers. And the canons of our Saxon church, publiſhed in the reign of king Edgar (n), concur in the ſame prohibition: though our ſecular laws, at leaſt after the conqueſt, did even in the times of popery diſpenſe with this canonical impediment; and ſpiritual perſons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may obſerve, that it is to this day a branch of the king's prerogative, at the death of every biſhop, to have his kennel of hounds, or a compoſition in lieu thereof (o).

BUT, with regard to the riſe and original of our preſent civil prohibitions, it will be found that all foreſt and game laws were introduced into Europe at the ſame time, and by the ſame policy as gave birth to the feodal ſyſtem; when thoſe ſwarms of barbarians iſſued from their northern hive, and laid the foundation of moſt of the preſent kingdoms of Europe, on the ruins of the weſtern empire. For when a conquering general came to ſettle the oeconomy of a vanquiſhed country, and to parcel it out among his ſoldiers or feudatories, who were to render him military ſervice for ſuch donations; it behoved him, in order to ſecure his new acquiſition, to keep the *ruſtici* or natives of the county, and all who were not his military tenants, in as low a condition as poſſible, and eſpecially to prohibit them the uſe of arms. Nothing could do this more effectually than a prohibition of hunting and ſporting: and therefore it was the policy of the conqueror to reſerve this right to himſelf, and ſuch on whom he ſhould beſtow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal conſtitutions (p), one and the ſame law

(l) *Decretal. l.* 5. *tit.* 24. *c.* 2.
(m) *Decret. part.* 1. *diſt.* 34. *l.* 1.
(n) *cap.* 64.
(o) 4. Inſt. 309.
(p) *Feud. l.* 2. *tit.* 27. §. 5.

prohibiting

prohibiting the *ruſtici* in general from carrying arms, and alſo proſcribing the uſe of nets, ſnares, or other engines for deſtroying the game. This excluſive privilege well ſuited the martial genius of the conquering troops, who delighted in a ſport (q) which in its purſuit and ſlaughter bore ſome reſemblance to war. *Vita omnis*, (ſays Cæſar, ſpeaking of the antient Germans) *in venationibus atque in ſtudiis rei militaris conſiſtit* (r). And Tacitus in like manner obſerves, that *quoties bella non ineunt, multum venatibus, plus per otium tranſigunt* (s). And indeed, like ſome of their modern ſucceſſors, they had no other amuſement to entertain their vacant hours; they deſpiſing all arts as effeminate, and having no other learning, than was couched in ſuch rude ditties, as were ſung at the ſolemn carouſals which ſucceeded theſe antient huntings. And it is remarkable that, in thoſe nations where the feodal policy remains the moſt corrupted, the foreſt or game laws continue in their higheſt rigour. In France all game is properly the king's; and in ſome parts of Germany it is death for a peaſant to be found hunting in the woods of the nobility (t).

WITH us in England alſo, hunting has ever been eſteemed a moſt princely diverſion and exerciſe. The whole iſland was repleniſhed with all ſorts of game in the times of the Britons; who lived in a wild and paſtoral manner, without incloſing or improving their grounds, and derived much of their ſubſiſtence from the chaſe, which they all enjoyed in common. But when huſbandry took place under the Saxon government, and lands began to be cultivated, improved, and encloſed, the beaſts naturally fled into the woody and deſert tracts; which were called the foreſts, and, having never been diſpoſed of in the firſt diſtribution of lands, were therefore held to belong to the crown. Theſe were filled with great plenty of game, which our royal ſportſ-

(q) In the laws of Jenghiz Khan, founder of the Mogul and Tartarian empire, publiſhed *A. D.* 1205. there is one which prohibits the killing of all game from March to October; that the court and ſoldiery might find plenty enough in the winter during their receſs from war. (Mod. Univ. Hiſt. iv. 468.)

(r) *De bell. Gall. l. 6. c.* 20.

(s) *c.* 15.

(t) Mattheus *de Crimin. c.* 3. *tit.* 1. Carpzov. *Practic. Saxonic. p.* 2. *c.* 84.

men

men reſerved for their own diverſion, on pain of a pecuniary forfeiture for ſuch as interfered with their ſovereign. But every freeholder had the full liberty of ſporting upon his own territories, provided he abſtained from the king's foreſts: as is fully expreſſed in the laws of Canute (v), and of Edward the confeſſor (u); "*ſit quilibet homo dignus venatione "ſua, in ſylva, et in agris, ſibi propriis et in dominio ſuo: et "abſtineat omnis homo a venariis regis, ubicunque pacem eis "habere voluerit:*" which indeed was the antient law of the Scandinavian continent, from whence Canute probably derived it. "*Cuique enim in proprio ſundo quamlibet feram quoquo modo venari permiſſum* (w)."

HOWEVER, upon the Norman conqueſt, a new doctrine took place; and the right of purſuing and taking all beaſts of chaſe or *venary*, and ſuch other animals as were accounted *game*, was then held to belong to the king, or to ſuch only as were authorized under him. And this, as well upon the principles of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the univerſal ſoil, to enter thereon, and to chaſe and take ſuch creatures at his pleaſure: as alſo upon another maxim of the common law, which we have frequently cited and illuſtrated, that theſe animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative. As therefore the former reaſon was held to veſt in the king a *right* to purſue and take them any where; the latter was ſuppoſed to give the king, and ſuch as he ſhould authorize, a *ſole* and *excluſive* right.

THIS right, thus newly veſted in the crown, was exerted with the utmoſt rigor, at and after the time of the Norman eſtabliſhment; not only in the antient foreſts, but in the new ones which the conqueror made, by laying together

(v) *c.* 77.
(u) *c.* 36.
(w) Stiernhook. *de jure Sueon. l.* 2. *c.*8.

vaſt

vaſt tracts of country, depopulated for that purpoſe, and reſerved ſolely for the king's royal diverſion; in which were exerciſed the moſt horrid tyrannies and oppreſſions, under colour of foreſt law, for the ſake of preſerving the beaſts of chaſe; to kill any of which, within the limits of the foreſt, was as penal as the death of a man. And, in purſuance of the ſame principle, king John laid a total interdict upon the *winged* as well as the *fourfooted* creation: "*capturum avium per totam Angliam interdixit* (x)." The cruel and inſupportable hardſhips, which theſe foreſt laws created to the ſubject, occaſioned our anceſtors to be as zealous for their reformation, as for the relaxation of the feodal rigors and the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de foreſta* as warmly contended for, and extorted from the king with as much difficulty, as thoſe of *magna carta* itſelf. By this charter, confirmed in parliament (y), many foreſts were diſafforeſted, or ſtripped of their oppreſſive privileges, and regulations were made in the regimen of ſuch as remained; particularly (z) killing the king's deer was made no longer a capital offence, but only puniſhed by fine, impriſonment, or abjuration of the realm. And by a variety of ſubſequent ſtatutes, together with the long acquieſcence of the crown without exerting the foreſt laws, this prerogative is now become no longer a grievance to the ſubject.

BUT, as the king reſerved to himſelf the *foreſts* for his own excluſive diverſion, ſo he granted out from time to time other tracts of land to his ſubjects under the names of *chaſes* or *parks* (a); or gave them licence to make ſuch in their own grounds; which indeed are ſmaller foreſts, in the hands of a ſubject, but not governed by the foreſt laws: and by the common law no perſon is at liberty to take or kill any beaſts of chaſe, but ſuch as hath an antient chaſe or park; unleſs they be alſo beaſts of prey.

(x) M. Paris. 303
(y) 9. *Hen. III.*
(z) *cap.* 10.
(a) See pag. 38.

As

As to all inferior ſpecies of game, called beaſts and fowls of warren, the liberty of taking or killing them is another franchiſe or royalty, derived likewiſe from the crown, and called *free warren*; a word which ſignifies preſervation or cuſtody: as the excluſive liberty of taking and killing fiſh in a public ſtream or river is called a *free fiſhery*; of which however no new franchiſe can at preſent be granted, by the expreſs proviſion of *magna carta*, *c.* 16 (b). The principal intention of granting a man theſe franchiſes or liberties was in order to protect the game, by giving him a ſole and excluſive power of killing it himſelf, provided he prevented other perſons. And no man, but he who has a chaſe or free warren, by grant from the crown, or preſcription which ſuppoſes one, can juſtify hunting or ſporting upon another man's ſoil; nor indeed, in thorough ſtrictneſs of common law, either hunting or ſporting at all.

HOWEVER novel this doctrine may ſeem, it is a regular conſequence from what has been before delivered; that the ſole right of taking and deſtroying game belongs excluſively to the king. This appears, as well from the hiſtorical deduction here made, as becauſe he may grant to his ſubjects an excluſive right of taking them; which he could not do, unleſs ſuch a right was firſt inherent in himſelf. And hence it will follow, that no perſon whatever, but he who has ſuch derivative right from the crown, is by common law entitled to take or kill any beaſts of chaſe, or other game whatſoever. It is true, that by the acquieſcence of the crown, the frequent grants of free warren in antient times, and the introduction of new penalties of late by certain ſtatutes for preſerving the game, this excluſive prerogative of the king is little known or conſidered; every man, that is exempted from theſe modern penalties, looking upon himſelf as at liberty to do what he pleaſes with the game: whereas the contrary is ſtrictly true, that no man, however well *qualified* he may vulgarly be eſteemed, has a right to encroach on the

(b) Mirr. c. 5 §. 2. See pag. 39.

royal prerogative by the killing of game, unleſs he can ſhew a particular grant of free warren; or a preſcription, which preſumes a grant; or ſome authority under an act of parliament. As for the latter, I know but of two inſtances wherein an expreſs permiſſion to kill game was ever given by ſtatute; the one by 1 Jac. I. c. 27. altered by 7 Jac. I. c. 11. and virtually repealed by 22 & 23 Car. II. c. 25. which gave authority, ſo long as they remained in force, to the owners of free warren, to lords of manors, and to all freeholders having 40 *l. per annum* in lands of inheritance, or 80 *l.* for life or lives, or 400 *l.* perſonal eſtate, (and their ſervants) to take partridges and pheaſants upon their own or their maſter's free warren, inheritance, or freehold: the other by 5 Ann. c. 14. which empowers lords and ladies of manors to appoint gamekeepers to kill game for the uſe of ſuch lord or lady; which with ſome alterations ſtill ſubſiſts, and plainly ſuppoſes ſuch power not to have been in them before. The truth of the matter is, that theſe game laws (of which we ſhall have occaſion to ſpeak again in the fourth book of theſe commentaries) do indeed *qualify* nobody, except in the inſtance of a gamekeeper, to kill game; but only to ſave the trouble and formal proceſs of an action by the perſon injured, who perhaps too might remit the offence, theſe ſtatutes inflict *additional* penalties, to be recovered either in a regular or ſummary way, by any of the king's ſubjects, from certain perſons of inferior rank who may be found offending in this particular. But it does not follow that perſons, excuſed from theſe additional penalties, are therefore *authoriſed* to kill game. The circumſtances, of having 100*l. per annum*, and the reſt, are not properly qualifications, but exemptions. And theſe perſons, ſo exempted from the penalties of the game ſtatutes, are not only liable to actions of treſpaſs from the owners of the land; but alſo, if they kill game within the limits of any royal franchiſe, they are liable to the actions of ſuch who may have the right of chaſe or free warren therein.

UPON

UPON the whole it appears, that the king, by his prerogative, and ſuch perſons as have, under his authority, the royal franchiſes of chaſe, park, free warren, or free fiſhery, are the only perſons, who may acquire any property, however fugitive and tranſitory, in theſe animals *ferae naturae*, while living; which is ſaid to be veſted in them, as was obſerved in a former chapter, *propter privilegium*. And it muſt alſo be remembered, that ſuch perſons as may lawfully hunt, fiſh, or fowl, *ratione privilegii*, have (as has been ſaid) only a qualified property in theſe animals; it not being abſolute or permanent, but laſting only ſo long as the creatures remain within the limits of ſuch reſpective franchiſe or liberty, and ceaſing the inſtant they voluntarily paſs out of it. It is held indeed, that if a man ſtarts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himſelf (c). And this is grounded on reaſon and natural juſtice (d): for the property conſiſts in the poſſeſſion; which poſſeſſion commences by the finding it in his own liberty, and is continued by the immediate purſuit. And ſo, if a ſtranger ſtarts game in one man's chaſe or free warren, and hunts it into another liberty, the property continues in the owner of the chaſe or warren; this property ariſing from privilege (e), and not being changed by the act of a mere ſtranger. Or if a man ſtarts game on another's private grounds and kills it there, the property belongs to him in whoſe ground it was killed, becauſe it was alſo ſtarted there (f); this property ariſing *ratione ſoli*. Whereas if, after being ſtarted there, it is killed in the grounds of a third perſon, the property belongs not to the owner of the firſt ground, becauſe the property is local; nor yet to the owner of the ſecond, becauſe it was not ſtarted in his ſoil; but it veſts in the perſon who ſtarted and killed it (g), though guilty of a treſpaſs againſt both the owners.

(c) 11 Mod. 75.
(d) Puff. L. N. l. 4. c. 6.
(e) Lord Raym. 251.
(f) Lord Raym. 251.
(g) Farr. 18. Lord Raym. 251.

III. I PROCEED now to a third method, whereby a title to goods and chattels may be acquired and loſt, *viz.* by *forfeiture*; as a puniſhment for ſome crime or miſdemeſnor in the party forfeiting, and as a compenſation for the offence and injury committed againſt him to whom they are forfeited. Of forfeitures, conſidered as the means whereby *real* property might be loſt and acquired, we treated in a former chapter (h). It remains therefore in this place only to mention, by what means or for what offences goods and chattels become liable to forfeiture.

IN the variety of penal laws with which the ſubject is at preſent incumbered, it were a tedious and impracticable taſk to reckon up the various forfeitures, inflicted by ſeveral ſtatutes, for particular crimes and miſdemeſnors: ſome of which are *mala in ſe*, or offences againſt the divine law, either natural or revealed; but by far the greateſt part are *mala prohibita*, or ſuch as derive their guilt merely from their prohibition by the laws of the land: ſuch as is the forfeiture of 40*s. per* month by the ſtatute 5 Eliz. c. 4. for exerciſing a trade without having ſerved ſeven years as an apprentice thereto; and the forfeiture of 10*l.* by 9 Ann. c. 23. for printing an almanac without a ſtamp. I ſhall therefore confine myſelf to thoſe offences only, by which *all* the goods and chattels of the offender are forfeited: referring the ſtudent for ſuch, where pecuniary mulcts of different quantities are inflicted, to their ſeveral proper heads, under which very many of them have been or will be mentioned; or elſe to the collections of Hawkins and Burn, and other laborious compilers. Indeed, as moſt of theſe forfeitures belong to the crown, they may ſeem as if they ought to have been referred to the preceding method of acquiring perſonal property, namely, by prerogative. But as, in the inſtance of partial forfeitures, a moiety often goes to the informer, the poor, or ſometimes to other perſons: and as one total forfeiture, namely that by a bankrupt who is guilty of felony by

(h) See pag. 267.

concealing

concealing his effects, accrues entirely to his creditors, I have therefore made it a diſtinct head of transferring property.

GOODS and chattels then are totally forfeited by conviction of *high treaſon*, or *miſpriſion* of treaſon; of *petit treaſon*; of *felony* in general, and particularly of *felony de ſe*, and of *man-ſlaughter*; nay even by conviction of *excuſable homicide* (i); by *outlawry* for treaſon or felony; by conviction of *petit larceny*; by *flight* in treaſon or felony, even though the party be acquitted of the fact; by *ſtanding mute*, when arraigned of felony; by *drawing a weapon on a judge*, or *ſtriking* any one *in the preſence of the king's courts*; by *praemunire*; by *pretended prophecies*, upon a ſecond conviction; by *owling*; by the *reſiding abroad* of artificers; and by *challenging to fight* on account of money won at gaming. All theſe offences, as will more fully appear in the fourth book of theſe commentaries, induce a total forfeiture of goods and chattels.

AND this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of ſo vague and fluctuating a nature, that to affect them, by any relation back, would be attended with more inconvenience than in the caſe of landed eſtates: and part, if not the whole of them, muſt be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the intereſt of the crown, is made void by ſtatute 13 Eliz. c. 5

(i) Co. Litt. 391. 2 Inſt. 316. 3 Inſt. 320.

CHAPTER THE TWENTY EIGHTH.

OF TITLE BY CUSTOM.

A FOURTH method of acquiring property in things perſonal, or chattels, is by *cuſtom*: whereby a right veſts in ſome particular perſons, either by the local uſage of ſome particular place, or by the almoſt general and univerſal uſage of the kingdom. It were endleſs, ſhould I attempt to enumerate all the ſeveral kinds of ſpecial cuſtoms, which may entitle a man to chattel intereſt in different parts of the kingdom: I ſhall therefore content myſelf with making ſome obſervations on three ſorts of cuſtomary intereſts, which obtain pretty generally throughout moſt parts of the nation, and are therefore of more univerſal concern; viz. *heriots*, *mortuaries*, and *heir-looms*.

I. HERIOTS, which were ſlightly touched upon in a former chapter (a), are uſually divided into two ſorts, heriot-*ſervice*, and heriot-*cuſtom*. The former are ſuch as are due upon a ſpecial reſervation in a grant or leaſe of lands, and therefore amount to little more than a mere rent (b): the latter ariſe upon no ſpecial reſervation whatſoever, but depend merely upon immemorial uſage and cuſtom (c). Of theſe therefore we are here principally to ſpeak: and they are defined to be a cuſtomary tribute of goods and chattels, payable to the lord of the fee on the deceaſe of the owner of the land.

(a) pag. 97. (b) 2 Sand. 166. (c) Co. Copyh. §. 24.

THE

THE firſt eſtabliſhment, if not introduction, of compulſory heriots into England, was by the Danes: and we find in the laws of king Canute (d) the ſeveral *heregeates* or heriots ſpecified, which were then exacted by the king on the death of divers of his ſubjects, according to their reſpective dignities; from the higheſt *eorle* down to the moſt inferior *thegne* or landholder. Theſe, for the moſt part, conſiſted in arms, horſes, and habiliments of war; which the word itſelf, according to ſir Henry Spelman (e), ſignifies. Theſe were delivered up to the ſovereign on the death of the vaſal, who could no longer uſe them, to be put into other hands for the ſervice and defence of the country. And upon the plan of this Daniſh eſtabliſhment did William the conqueror faſhion his law of reliefs, as was formerly obſerved (f); when he aſcertained the preciſe relief to be taken of every tenant in chivalry, and contrary to the feodal cuſtom and the uſage of his own dutchy of Normandy, required arms and implements of war to be paid inſtead of money (g).

THE Daniſh compulſive heriots, being thus tranſmuted into reliefs, underwent the ſame ſeveral viciſſitudes as the feodal tenures, and in ſocage eſtates do frequently remain to this day, in the ſhape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preſerve that name, ſeeming rather to be of Saxon parentage, and at firſt to have been merely diſcretionary (h). Theſe are now for the moſt part confined to copyhold tenures, and are due by cuſtom only, which is the life of all eſtates by copy; and perhaps are the only inſtance where cuſtom has favoured the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raiſed a degree above villenage, when all his goods and chattels were quite at the mercy of the lord: and cuſtom, which has on the one hand con-

(d) *c.* 69.
(e) of feuds. c. 18.
(f) pag. 65.
(g) *LL. Guil. Conqu. c.* 22, 23, 24.
(h) Lambard. Peramb. of Kent. 492.

firmed the tenant's intereſt in excluſion of the lord's will, has on the other hand eſtabliſhed this diſcretional piece of gratitude into a permanent duty. An heriot may alſo appertain to free land, that is held by ſervice and ſuit of court; in which caſe it is moſt commonly a copyhold enfranchiſed, whereupon the heriot is ſtill due by cuſtom. Bracton (i) ſpeaks of heriots as frequently due on the death of both ſpecies of tenants: "*eſt quidem alia praeſtatio quae nominatur* "*heriettum*; *ubi tenens, liber vel ſervus, in morte ſua domi-*"*num ſuum, de quo tenuerit, reſpicit de meliori averio ſuo,* "*vel de ſecundo meliori, ſecundum diverſam locorum conſuetu-*"*dinem.*" And this, he adds, "*magis fit de gratia quam de* "*jure*;" in which Fleta (k) and Britton (l) agree: thereby plainly intimating the original of this cuſtom to have been merely voluntary, as a legacy from the tenant; though now the immemorial uſage has eſtabliſhed it as of right in the lord.

THIS heriot is ſometimes the beſt live beaſt, or *averium*, which the tenant dies poſſeſſed of, (which is particularly denominated the villein's relief in the twenty ninth law of king William the conqueror) ſometimes the beſt inanimate good, under which a jewel or piece of plate may be included: but it is always a *perſonal* chattel, which, immediately on the death of the tenant who was the owner of it, being aſcertained by the option of the lord (m), becomes veſted in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant muſt be the owner of it, elſe it cannot be due; and therefore on the death of a feme-covert no heriot can be taken; for ſhe can have no ownerſhip in things perſonal (n). In ſome places there is a cuſtomary compoſition in money, as ten or twenty ſhillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indiſputably antient cuſtom: but a new compoſition of this ſort will not bind the repreſentatives of either party; for that amounts to the creation of a new cuſtom, which is now impoſſible (o).

(i) *l.* 2 *c.* 36. §. 9.
(k) *l.* 3. *c.* 18.
(l) *c.* 69.
(m) Hob. 60.
(n) Keilw. 84. 4 Leon. 239.
(o) Co. Copyh. §. 31.

2. MOR-

2. MORTUARIES are a ſort of eccleſiaſtical heriots, being a cuſtomary gift claimed by and due to the miniſter in very many pariſhes on the death of his pariſhioners. They ſeem originally to have been, like lay heriots, only a voluntary bequeſt to the church; being intended, as Lyndewode informs us, from a conſtitution of archbiſhop Langham, as a kind of expiation and amends to the clergy for the perſonal tithes, and other eccleſiaſtical duties, which the laity in their life-time might have neglected or forgotten to pay. For this purpoſe, *after* (p) the lord's heriot or beſt good was taken out, the ſecond beſt chattel was reſerved to the church as a mortuary: "*ſi decedens plura habuerit animalia, optimo cui* "*de jure fuerit debitum reſervato, eccleſiae ſuae ſine dolo, frau-* "*de, ſeu contradictione qualibet, pro recompenſatione ſubtracti-* "*onis decimarum perſonalium, necnon et oblationum, ſecundum* "*melius animal reſervetur, poſt obitum, pro ſalute animae* "*ſuae* (q)." And therefore in the laws of king Canute (r) this mortuary is called ſoul-ſcot (ꝛaꝑꝛceaꝛ) or *ſymbolum animae*. And, in purſuance of the ſame principle, by the laws of Venice, where no perſonal tithes have been paid during the life of the party, they are paid at his death out of his merchandize, jewels, and other moveables (s). So alſo, by a ſimilar policy, in France, every man that died without bequeathing a part of his eſtate to the church, which was called *dying without confeſſion*, was formerly deprived of chriſtian burial: or, if he died inteſtate, the relations of the deceaſed, jointly with the biſhop, named proper arbitrators to determine what he ought to have given to the church, in caſe he had made a will. But the parliament, in 1409, redreſſed this grievance (t).

IT was antiently uſual in this kingdom to bring the mortuary to church along with the corps when it came to be buried; and thence (u) it is ſometimes called a *corſe-preſent*: a

(p) Co. Litt. 185.
(q) *Provinc. l.* 1. *tit.* 3.
(r) c. 13.
(s) Panormitan. *ad Decretal. l* 3. *t.* 20. *c.* 32.
(t) Sp. L. b. 28. c. 41.
(u) Selden. hiſt of tithes, c. 10.

term,

term, which beſpeaks it to have been once a voluntary donation. However in Bracton's time, ſo early as Henry III, we find it rivetted into an eſtabliſhed cuſtom: inſomuch that the bequeſt of heriots and mortuaries were held to be neceſſary ingredients in every teſtament of chattels. "*Imprimis* "*autem debet quilibet, qui teſtamentum fecerit, dominum ſuum* "*de meliori re quam habuerit recognoſcere; et poſtea eccleſiam de* "*alia meliori:*" the lord muſt have the beſt good left him as an heriot; and the church the ſecond beſt as a mortuary. But yet this cuſtom was different in different places: "*in* "*quibuſdam locis habet eccleſia melius animal de conſuetudine;* "*in quibuſdam ſecundum, vel tertium melius; et in quibuſdam* "*nihil: et ideo conſideranda eſt conſuetudo loci* (w)." This cuſtom ſtill varies in different places, not only as to the mortuary to be paid, but the perſon to whom it is payable. In Wales, a mortuary or corſe-preſent was due upon the death of every clergyman to the biſhop of the dioceſe; till aboliſhed, upon a recompence given to the biſhop, by the ſtatute 12 Ann. ſt. 2. c. 6. And in the archdeaconry of Cheſter a cuſtom alſo prevailed, that the biſhop, who is alſo archdeacon, ſhould have at the death of every clergyman dying therein, his beſt horſe or mare, bridle, ſaddle, and ſpurs, his beſt gown or cloak, hat, upper garment under his gown, and tippet, and alſo his beſt ſignet or ring (x). But by ſtatute 28 Geo. II. c. 6. this mortuary is directed to ceaſe, and the act has ſettled upon the biſhop an equivalent in its room. The king's claim to many goods on the death of all prelates in England, ſeems to be of the ſame nature; though ſir Edward Coke (y) apprehends, that this is a *duty due upon death*, and not a *mortuary:* a diſtinction which ſeems to be without a difference. For not only the king's eccleſiaſtical character, as ſupreme ordinary, but alſo the ſpecies of the goods claimed, which bear ſo near a reſemblance to thoſe in the archdeaconry of Cheſter, which was an acknowledged mortuary, puts the matter out of diſpute. The king, according to the record vouched by ſir Edward Coke, is entitled to ſix things; the biſhop's beſt horſe or palfrey, with his furni-

(w) Bracton. *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57. (x) Cro. Car. 237. (y) 2 Inſt. 491.

ture;

ture: his cloak, or gown, and tippet: his cup, and cover: his baſon, and ewer: his gold ring: and, laſtly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter (z).

THIS variety of cuſtoms, with regard to mortuaries, giving frequently a handle to exactions on the one ſide, and frauds or expenſive litigations on the other; it was thought proper by ſtatute 21 Henry VIII. c. 6. to reduce them to ſome kind of certainty. For this purpoſe it is enacted, that all mortuaries, or corſe-preſents to parſons of any pariſh, ſhall be taken in the following manner; unleſs where by cuſtom leſs or none at all is due: viz. for every perſon who does not leave goods to the value of ten marks, nothing: for every perſon who leaves goods to the value of ten marks, and under thirty pounds, 3*s.* 4*d.* if above thirty pounds, and under forty pounds, 6*s.* 8*d.* if above forty pounds, of what value ſoever they may be, 10*s.* and no more. And no mortuary ſhall throughout the kingdom be paid for the death of any feme-covert; nor any child; nor for any one of full age, that is not a houſekeeper; nor for any wayfaring man; but ſuch wayfaring man's mortuary ſhall be paid in the pariſh to which he belongs. And upon this ſtatute ſtands the law of mortuaries to this day.

3. HEIR-LOOMS are ſuch goods and perſonal chattels, as, contrary to the nature of chattels, ſhall go by ſpecial cuſtom to the heir along with the inheritance, and not to the executor of the laſt proprietor. The termination, *loom*, is of Saxon original; in which language it ſignifies a limb or member (a); ſo that an heir-loom is nothing elſe but a limb or member of the inheritance. They are generally ſuch things as cannot be taken away without damaging or diſmembering the freehold; otherwiſe the general rule is, that no chattel intereſt whatſoever ſhall go to the heir, notwithſtanding it be expreſsly limited to a man and his heirs, but ſhall veſt in the executor (b). But deer in a real authorized park, fiſhes in a pond, doves in a dove-houſe, *&c.* though in themſelves

(z) pag. 413. (a) Spelm. *Gloſſ.* 277. (b) Co. Litt. 388.

perſonal

perſonal chattels, yet they are ſo annexed to and ſo neceſſary to the well-being of the inheritance, that they ſhall accompany the land wherever it veſts either by deſcent or purchaſe (c). For this reaſon alſo I apprehend it is, that the antient jewels of the crown are held to be heir-looms (d): for they are neceſſary to maintain the ſtate, and ſupport the dignity, of the ſovereign for the time being. Charters likewiſe, and deeds, court-rolls, and other evidences of the land, together with the cheſts in which they are contained, ſhall paſs together with the land to the heir, in the nature of heir-looms, and ſhall not go to the executor (e). By ſpecial cuſtom alſo, in ſome places, carriages, utenſils, and other houſehold implements may be heir-looms (f); but ſuch cuſtom muſt be ſtrictly proved. On the other hand, by almoſt general cuſtom, whatever is ſtrongly affixed to the freehold or inheritance, and cannot be ſevered from thence without violence or damage, "*quod ab aedibus non facile revellitur* (g)," is become a member of the inheritance, and ſhall thereupon paſs to the heir; as marble chimney-pieces, pumps, old fixed or dormant tables, benches, and the like (h). A very ſimilar notion to which prevails in the duchy of Brabant; where they rank certain things moveable among thoſe of the immoveable kind, calling them by a very peculiar appellation, *praedia volantia*, or volatile eſtates: ſuch as beds, tables, and other heavy implements of furniture, which (as an author of their own obſerves) "*dignitatem iſtam nacta ſunt, ut villis, ſylvis, et aedibus, aliiſque praediis, comparentur; quod ſo-lidiora mobilia ipſis aedibus ex deſtinatione patrisfamilias co-haerere videantur, et pro parte ipſarum aedium aeſti-mentur* (i)."

OTHER perſonal chattels there are, which alſo deſcend to the heir in the nature of heir-looms, as a monument or tomb-ſtone in a church, or the coat-armor of his anceſtor

(c) Co. Litt. 8.
(d) *Ibid.* 18.
(e) Bro. *Abr. tit. chattels.* 18.
(f) Co. Litt. 18. 185.
(g) Spelm. *Gloſſ.* 277.
(h) 12 Mod. 520.
(i) Stockmans *de jure devolutionis*, *c.* 3. §. 16.

there

there hung up, with the pennons and other enſigns of honor, ſuited to his degree. In this caſe, albeit the freehold of the church is in the parſon, and theſe are annexed to that freehold, yet cannot the parſon or any other take them away or deface them, but is liable to an action from the heir (k). Pews in the church are ſomewhat of the ſame nature, which may deſcend by cuſtom immemorial (without any eccleſiaſtical concurrence) from the anceſtor to the heir (l). But though the heir has a property in the monuments and eſcutcheons of his anceſtors, yet he has none in their bodies or aſhes; nor can he bring any civil action againſt ſuch as indecently at leaſt, if not impiouſly, violate and diſturb their remains, when dead and buried. The parſon indeed who has the freehold of the ſoil, may bring an action of treſpaſs againſt ſuch as dig and diſturb it: and, if any one in taking up a dead body ſteals the ſhrowd or other apparel, it will be felony (m); for the property thereof remains in the executor, or whoever was at the charge of the funeral.

BUT to return to heir-looms: theſe, though they be mere chattels, yet cannot be deviſed away from the heir by will; but ſuch a deviſe is void (n), even by a tenant in fee-ſimple. For, though the owner might during his life have ſold or diſpoſed of them, as he might of the timber of the eſtate, ſince as the inheritance was his own, he might mangle or diſmember it as he pleaſed; yet they being at his death inſtantly veſted in the heir, the deviſe (which is ſubſequent, and not to take effect till *after* his death) ſhall be poſtponed to the cuſtom, whereby they have already deſcended.

(k) 12 Rep. 105. Co. Litt. 18.
(l) 3 Inſt. 202. 12 Rep. 105.
(m) 3 Inſt. 110. 12 Rep. 113. 1 Hal. P. C. 515.
(n) Co. Litt. 185.

CHAPTER

CHAPTER THE TWENTY NINTH.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

IN the preſent chapter we ſhall take into conſideration three other ſpecies of title to goods and chattels.

V. THE fifth method therefore of gaining a property in chattels, either perſonal or real, is by *ſucceſſion:* which is, in ſtrictneſs of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, maſter and fellows, and the like; in which one ſet of men may, by ſucceeding another ſet, acquire a property in all the goods, moveables, and other chattels of the corporation. The true reaſon whereof is, becauſe in judgment of law a corporation never dies; and therefore the predeceſſors, who lived a century ago, and their ſucceſſors now in being, are one and the ſame body corporate (a). Which identity is a property ſo inherent in the nature of a body politic, that, even when it is meant to give any thing to be taken in ſucceſſion by ſuch a body, that ſucceſſion need not be expreſſed; but the law will of itſelf imply it. So that a gift to ſuch a corporation, either of lands or of chattels, without naming their ſucceſſors, veſts an abſolute property in them ſo long as the corporation ſubſiſts (b). And thus a leaſe for years,

(a) 4 Rep. 65. (b) Bro. *Abr. t. eſtates.* 90. Cro. Eliz. 464.

an

an obligation, a jewel, a flock of ſheep, or other chattel intereſt, will veſt in the ſucceſſors, by ſucceſſion, as well as in the identical members, to whom it was originally given.

BUT, with regard to ſole corporations, a conſiderable diſtinction muſt be made. For if ſuch ſole corporation be the repreſentative of a number of perſons; as the maſter of an hoſpital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the reformation, who repreſented the whole convent; or the dean of ſome antient cathedrals, who ſtands in the place of, and repreſents in his corporate capacity, the chapter; ſuch ſole corporations as theſe have in this reſpect the ſame powers as corporations aggregate have, to take perſonal property or chattels in ſucceſſion. And therefore a bond to ſuch a maſter, abbot or dean, and his ſucceſſors, is good in law; and the ſucceſſor ſhall have the advantage of it, for the benefit of the aggregate ſociety, of which he is in law the repreſentative (c). Whereas in the caſe of ſole corporations, which repreſent no others but themſelves, as biſhops, parſons, and the like, no chattel intereſt can regularly go in ſucceſſion: and therefore, if a leaſe for years be made to the biſhop of Oxford and his ſucceſſors, in ſuch caſe his executors or adminiſtrators, and not his ſucceſſors, ſhall have it (d). For the word *ſucceſſors*, when applied to a perſon in his politic capacity, is equivalent to the word *heirs* in his natural: and as ſuch a leaſe for years, if made to John and his heirs, would not veſt in his heirs, but his executors; ſo, if it be made to John biſhop of Oxford and his ſucceſſors, who are the heirs of his body politic, it ſhall ſtill veſt in his executors and not in ſuch his ſucceſſors. The reaſon of this is obvious: for, beſides that the law looks upon goods and chattels as of too low and periſhable a nature to be limited either to heirs, or ſuch ſucceſſors as are equivalent to heirs; it would alſo follow, that if any ſuch chattel intereſt (granted to a ſole corporation and his ſucceſſors) were allowed to deſcend to ſuch ſucceſſor, the property thereof muſt be in abeyance from the death of the

(c) Dyer. 48. Cro. Eliz. 464. (d) Co. Litt. 46.

preſent

preſent owner until the ſucceſſor be appointed: and this is contrary to the nature of a chattel intereſt, which can never be in abeyance or without an owner (e); but a man's right therein, when once ſuſpended, is gone for ever. This is not the caſe in corporations aggregate, where the right is never in ſuſpenſe, nor in the other ſole corporations before-mentioned, who are rather to be conſidered as heads of an aggregate body, than ſubſiſting merely in their own right: the chattel intereſt therefore, in ſuch a caſe, is really and ſubſtantially veſted in the hoſpital, convent, chapter, or other aggregate body; though the head is the viſible perſon in whoſe name every act is carried on, and in whom every intereſt is therefore ſaid (in point of form) to veſt. But the general rule, with regard to corporations merely ſole, is this, that no chattel can go or be acquired by right of ſucceſſion (f).

YET to this rule there are two exceptions. One in the caſe of the king, in whom a chattel may veſt by a grant of it formerly made to a preceding king and his ſucceſſors (g). The other exception is, where, by a *particular* cuſtom, ſome *particular* corporations ſole have acquired a power of taking *particular* chattel intereſts in ſucceſſion. And this cuſtom, being againſt the general tenor of the common law, muſt be ſtrictly interpreted, and not extended to any other chattel intereſts than ſuch immemorial uſage will ſtrictly warrant. Thus the chamberlain of London, who is a corporation ſole, may by the cuſtom of London, take *bonds* and *recognizances* to himſelf and his ſucceſſors, for the benefit of the orphan's fund (h): but it will not follow from thence, that he has a capacity to take a *leaſe for years* to himſelf and his ſucceſſors for the ſame purpoſe; for the cuſtom extends not to that: nor that he may take a *bond* to himſelf and his ſucceſſors, for any other purpoſe than the benefit of the orphan's fund; for that alſo is not warranted by the cuſtom. Wherefore, upon the whole, we may cloſe this head with laying down this general rule; that ſuch right of ſucceſſion to chattels is univerſally in-

(e) Brownl. 132.
(f) Co. Litt. 46.
(g) Co. Litt. 90.
(h) 4 Rep. 65. Cro. Eliz. 682.

herent

herent by the common law in all aggregate corporations, in the king, and in ſuch ſingle corporations as repreſent a number of perſons; and may, by ſpecial cuſtom, belong to certain other ſole corporations for ſome particular purpoſes; although, generally, in ſole corporations no ſuch right can exiſt.

VI. A SIXTH method of acquiring property in goods and chattels is by *marriage*; whereby thoſe chattels, which belonged formerly to the wife, are by act of law veſted in the huſband, with the ſame degree of property and with the ſame powers, as the wife, when ſole, had over them.

THIS depends entirely on the notion of an unity of perſon between the huſband and wife; it being held that they are one perſon in law (i), ſo that the very being and exiſtence of the woman is ſuſpended during the coverture, or entirely merged and incorporated in that of the huſband. And hence it follows, that whatever perſonal property belonged to the wife, before marriage, is by marriage abſolutely veſted in the huſband. In a real eſtate he only gains a title to the rents and profits during coverture: for that, depending upon feodal principles, remains entire to the wife after the death of her huſband, or to her heirs, if ſhe dies before him; unleſs, by the birth of a child, he becomes tenant for life by the courteſy. But, in chattel intereſts, the ſole and abſolute property veſts in the huſband, to be diſpoſed of at his pleaſure, if he chuſes to take poſſeſſion of them: for, unleſs he reduces them to poſſeſſion, by exerciſing ſome act of ownerſhip upon them, no property veſts in him, but they ſhall remain to the wife, or to her repreſentatives, after the coverture is determined.

THERE is therefore a very conſiderable difference in the acquiſition of this ſpecies of property by the huſband, according to the ſubject-matter; viz. whether it be a chattel

(i) See Book I. c. 15.

real, or a chattel *perſonal*; and, of chattels perſonal, whether it be in *poſſeſſion*, or in *action* only. A *chattel real* veſts in the huſband, not abſolutely, but *ſub modo*. As, in caſe of a leaſe for years; the huſband ſhall receive all the rents and profits of it, and may, if he pleaſes, ſell, ſurrender, or diſpoſe of it during the coverture (k): if he be outlawed or attainted, it ſhall be forfeited to the king (l): it is liable to execution for his debts (m): and, if he ſurvives his wife, it is to all intents and purpoſes his own (n). Yet if he has made no diſpoſition thereof in his life time, and dies before his wife, he cannot diſpoſe of it by will (o): for, the huſband having made no alteration in the property during his life, it never was transferred from the wife; but after his death ſhe ſhall remain in her antient poſſeſſion, and it ſhall not go to his executors. So it is alſo of chattels perſonal (or *choſes*) in *action*; as debts upon bond, contracts, and the like: theſe the huſband may have if he pleaſes; that is, if he reduces them into poſſeſſion by receiving or recovering them at law. And, upon ſuch receipt or recovery, they are abſolutely and entirely his own; and ſhall go to his executors or adminiſtrators, or as he ſhall bequeath them by will, and ſhall not reveſt in the wife. But, if he dies before he has recovered or reduced them into poſſeſſion, ſo that at his death they ſtill continue *choſes in action*, they ſhall ſurvive to the wife; for the huſband never exerted the power he had of obtaining an excluſive property in them (p). And ſo, if an eſtray comes into his wife's franchiſe, and the huſband ſeizes it, it is abſolutely his property: but if he dies without ſeizing it, his executors are not now at liberty to ſeize it, but the wife or her heirs (q); for the huſband never exerted the right he had, which right determined with the coverture. Thus in both theſe ſpecies of property the law is the ſame, in caſe the wife ſurvives the huſband; but, in caſe the huſband ſurvives the wife, the law is very different with reſpect to *chattels real*

(k) Co. Litt. 46.
(l) Plowd. 263.
(m) Co. Litt. 351.
(n) *Ibid.* 300.
(o) Poph. 5. Co. Litt. 351.
(p) Co. Litt. 351.
(q) *Ibid.*

and

and *choſes in action:* for he ſhall have the *chattel real* by ſurvivorſhip, but not the *choſe in action* (r); except in the caſe of arrears of rent, due to the wife before her coverture, which in caſe of her death are given to the huſband by ſtatute 32 Henry VIII. c. 37. And the reaſon for the general law is this: that the huſband is in abſolute poſſeſſion of the *chattel real* during the coverture, by a kind of joint-tenancy with his wife: wherefore the law will not wreſt it out of his hands, and give it to their repreſentatives: though in caſe he had died firſt, it would have ſurvived to the wife, unleſs he thought proper in his life-time to alter the poſſeſſion. But a *choſe in action* ſhall not ſurvive to him, becauſe he never was in poſſeſſion of it at all, during the coverture; and the only method he had to gain poſſeſſion of it, was by ſuing in his wife's right: but as, after her death, he cannot (as huſband) bring an action in her right, becauſe they are no longer one and the ſame perſon in law, therefore he can never (as ſuch) recover the poſſeſſion. But he ſtill will be intitled to be her adminiſtrator; and may, in that capacity, recover ſuch things in action as became due to her before or during the coverture.

THUS, and upon theſe reaſons, ſtands the law between huſband and wife, with regard to *chattels real*, and *choſes in action:* but, as to *chattels perſonal* (or *choſes*) *in poſſeſſion*, which the wife hath in her own right, as ready money, jewels, houſehold goods, and the like, the huſband hath therein an immediate and abſolute property, devolved to him by the marriage, not only potentially but in fact, which never can again reveſt in the wife or her repreſentative (s).

And, as the huſband may thus, generally, acquire a property in all the perſonal ſubſtance of the wife, ſo in one particular inſtance the wife may acquire a property in ſome of her huſband's goods; which ſhall remain to her after his death, and ſhall not go to his executors. Theſe are called

(r) 3. Mod. 186. (s) Co. Litt. 351.

her *paraphernalia*; which is a term borrowed from the civil law (t), and is derived from the Greek language, ſignifying ſomething over and above her dower. Our law uſes it to ſignify the apparel and ornaments of the wife, ſuitable to her rank and degree; which ſhe becomes entitled to at the death of her huſband over and above her jointure or dower, and preferably to all other repreſentatives (u); and the jewels of a peereſs, uſually worn by her, have been held to be *paraphernalia* (w). Neither can the huſband deviſe by his will ſnch ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to ſell them or give them away (x). But if ſhe continues in the uſe of them till his death, ſhe ſhall afterwards retain them againſt his executors and adminiſtrators, and all other perſons, except creditors, where there is a deficiency of aſſets (y). And her neceſſary apparel is protected even againſt the claim of creditors (z).

VII. A JUDGMENT, in conſequence of ſome ſuit or action in a court of juſtice, is frequently the means of veſting the right and property of chattel intereſts in the prevailing party. And here we muſt be careful to diſtinguiſh between property, the *right* of which is before veſted in the party, and of which only *poſſeſſion* is recovered by ſuit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the poſſeſſion by the proceſs and judgment of the law. Of the former ſort are all debts and *choſes in action*; as if a man gives bond for 20 *l.* or agrees to buy a horſe at a ſtated ſum, or takes up goods of a tradeſman upon an implied contract to pay as much as they are reaſonably worth: in all theſe caſes the right accrues to the creditor, and is compleatly veſted in him at the time of the bond being ſealed, and the contract or agreement made; and the law only gives him a remedy to

(t) *Ff.* 23. 3. 9. §. 3.
(u) Cro. Car. 343. 1. Roll. Abr. 911. 2 Leon. 166.
(w) Moor. 213.
(x) Noy's Max. c. 49.—Graham v. Lord Londonderry. 24. Nov. 1746. Canc.
(y) 1. P. Wms. 730.
(z) Noy. *ibid.*

recover

recover the poſſeſſion of that right, which already in juſtice belongs to him. But there is alſo a ſpecies of property to which a man has not any claim or title whatſoever, till after ſuit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common caſes, but accrue at one and the ſame time; and where, before judgment had, no man can ſay that he has any abſolute property, either in poſſeſſion or in action. Of this nature are,

1. SUCH penalties as are given by particular ſtatutes, to be recovered on an action *popular*; or in other words, to be recovered by him or them that will ſue for the ſame. Such as the penalty of 500*l*, which thoſe perſons are by ſeveral acts of parliament made liable to forfeit, that being in particular offices or ſituations in life, neglect to take the oaths to the government; which penalty is given to him or them that will ſue for the ſame. Now here it is clear that no particular perſon, A or B, has any right, claim, or demand, in or upon this penal ſum, till after action brought (a); for he that brings his action and can *bona fide* obtain judgment firſt, will undoubtedly ſecure a title to it, in excluſion of every body elſe. He obtains an inchoate imperfect degree of property by commencing his ſuit; but it is not conſummated till judgment, for if any colluſion appears, he loſes the priority he had gained (b). But otherwiſe the right ſo attaches in the firſt informer, that the king (who before action brought may grant a pardon which ſhall be a bar to all the world) cannot after ſuit commenced remit any thing but his own part of the penalty (c). For by commencing the ſuit the informer has made the popular action his own private action, and it is not in the power of the crown, or of any thing but parliament, to releaſe the informer's intereſt. This therefore is one inſtance, where a ſuit and judgment at law

(a) 2 Lev. 141. Stra. 1169. Combe v. Pitt. B. R. T. 3. Geo. III.
(b) Stat. 4. Hen. VII. c. 20.
(c) Cro. Eliz. 138. 11. Rep. 65.

are not only the means of recovering, but alſo of acquiring, property. And what is ſaid of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any perſon that will ſue for the ſame. They are placed as it were in a ſtate of nature, acceſſible by all the king's ſubjects, but the acquired right of none of them: open therefore to the firſt occupant, who declares his intention to poſſeſs them by bringing his action; and who carries that intention into execution, by obtaining judgment to recover them.

2. ANOTHER ſpecies of property, that is acquired and loſt by ſuit and judgment at law, is that of *damages* given to a man by a jury, as a compenſation and ſatisfaction for ſome injury ſuſtained; as for a battery, for impriſonment, for ſlander, or for treſpaſs. Here the plaintiff has no certain demand till after verdict; but, when the jury has aſſeſſed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty ſhillings, he inſtantly acquires, and the defendant loſes at the ſame time, a right to that ſpecific ſum. It is true, that this is not an acquiſition ſo perfectly original as in the former inſtance: for here the injured party has unqueſtionably a vague and indeterminate right to ſome damages or other, the inſtant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this caſe ſo properly veſt a *new* title in him, as fix and aſcertain the *old* one; they do not *give*, but *define*, the right. But however, though ſtrictly ſpeaking the primary right to a ſatisfaction for injuries is given by the law of nature, and the ſuit is only the means of aſcertaining and recovering that ſatisfaction; yet, as the legal proceedings are the only viſible means of this acquiſition of property, we may fairly enough rank ſuch damages, or ſatisfaction aſſeſſed, under the head of property acquired by ſuit and judgment at law.

3. HITHER

3. HITHER alſo may be referred, upon the ſame principle, all title to coſts and expences of ſuit; which are often arbitrary, and reſt entirely in the determination of the court, upon weighing all circumſtances, both as to the *quantum*, and alſo (in the courts of equity eſpecially, and upon motions in the courts of law) whether there ſhall be any coſts at all. Theſe coſts therefore, when given by the court to either party, may be looked upon as an acquiſition made by the judgment of law.

CHAPTER THE THIRTIETH.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

WE are now to proceed, according to the order marked out, to the diſcuſſion of two of the remaining methods of acquiring a title to property in things perſonal, which are much connected together, and anſwer in ſome meaſure to the conveyances of real eſtates; being thoſe by *gift*, or *grant*, and by *contract*: whereof the former veſts a property in *poſſeſſion*, the latter a property in *action*.

VIII. GIFTS then, or *grants*, which are the eighth method of transferring perſonal property, are thus to be diſtinguiſhed from each other, that *gifts* are always gratuitous, *grants* are upon ſome conſideration or equivalent: and they may be divided, with regard to their ſubject-matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *perſonal*. Under the head of gifts or grants of chattels *real* may be included all leaſes for years of land, aſſignments, and ſurrenders of thoſe leaſes; and all the other methods of conveying an eſtate leſs than freehold, which were conſidered in the twentieth chapter of the preſent book, and therefore need not be here again repeated; though theſe very ſeldom carry the outward appearance of a gift, however freely beſtowed; being uſually expreſſed to be made in conſideration of blood, or natural affection, or of five or ten ſhillings nominally paid to the grantor; and, in caſe of leaſes, always reſerving a rent, though it be but a pepper-corn: any of which conſiderations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

GRANTS

GRANTS or gifts, of chattels *perſonal*, are the act of tranſferring the right and the poſſeſſion of them; whereby one man renounces, and another man immediately acquires, all title and intereſt therein: which may be done either in writing, or by word of mouth (a) atteſted by ſufficient evidence, of which the delivery of poſſeſſion is the ſtrongeſt and moſt eſſential. But this conveyance, when merely voluntary, is ſomewhat ſuſpicious: and is uſually conſtrued to be fraudulent, if creditors or others become ſufferers thereby. And, particularly, by ſtatute 3 Hen. VII. c. 4. all deeds of gift of goods, made in truſt to the uſe of the donor, ſhall be void; becauſe otherwiſe perſons might be tempted to commit treaſon or felony, without danger of forfeiture; and the creditors of the donor might alſo be defrauded of their rights. And by ſtatute 13 Eliz. c. 5. every grant or gift of chattels, as well as lands, with intent to defraud creditors or others (b), ſhall be void as againſt ſuch perſons to whom ſuch fraud would be prejudicial; but, as againſt the grantor himſelf, ſhall ſtand good and effectual: and all perſons partakers in, or privy to, ſuch fraudulent grants, ſhall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved; and alſo on conviction ſhall ſuffer impriſonment for half a year.

A TRUE and proper gift or grant is always accompanied with delivery of poſſeſſion, and takes effect immediately; as if A gives to B 100*l*, or a flock of ſheep, and puts him in poſſeſſion of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it; though he did it without any conſideration or recompence (c): unleſs it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, dureſs, or the like; or if he were drawn in, circumvented, or impoſed upon, by falſe pretences, ebriety, or ſurprize. But if the gift does not take effect, by delivery of immediate poſſeſſion, it is then not properly a gift, but a contract; and this a man cannot

(a) Perk §. 57.
(b) See 3 Rep. 82.
(c) Jenk. 109.

be

be compelled to perform, but upon good and ſufficient conſideration; as we ſhall ſee under our next diviſion.

IX. A CONTRACT, which uſually conveys an intereſt merely in action, is thus defined: "an agreement, upon "ſufficient conſideration, to do or not to do a particular "thing." From which definition there ariſe three points to be contemplated in all contracts; 1. The *agreement*: 2. The *conſideration*: and 3. The *thing* to be done or omitted, or the different ſpecies of contracts.

FIRST then it is an *agreement*, a mutual bargain or convention; and therefore there muſt at leaſt be two contracting parties, of ſufficient ability to make a contract: as where A contracts with B to pay him 100*l.* and thereby transfers a property in ſuch ſum to B. Which property is however not in poſſeſſion, but in action merely, and recoverable by ſuit at law; wherefore it could not be transferred to another perſon by the ſtrict rules of the antient common law: for no *choſe* in action could be aſſigned or granted over (d), becauſe it was thought to be a great encouragement to litigiouſneſs, if a man were allowed to make over to a ſtranger his right of going to law. But this nicety is now diſregarded: though, in compliance with the antient principle, the form of aſſigning a *choſe* in action is in the nature of a declaration of truſt, and an agreement to permit the aſſignee to make uſe of the name of the aſſignor, in order to recover the poſſeſſion. And therefore, when in common acceptation a debt or bond is ſaid to be aſſigned over, it muſt ſtill be ſued in the original creditor's name; the perſon to whom it is transferred, being rather an attorney than an aſſignee. But the king is an exception to this general rule; for he might always either grant or receive a *choſe* in action by aſſignment (e): and our courts of equity, conſidering that in a commercial country almoſt all perſonal property muſt neceſſarily lie in contract, will protect the aſſignment of a *choſe* in action, as much as the law will that of a *choſe* in poſſeſſion (f).

(d) Co. Litt. 214.
(e) Dyer. 30. Bro. *Abr. tit. choſe in action.* 1 & 4.
(f) 3 P. Wms. 199.

THIS

THIS contract or agreement may be either expreſs or implied. *Expreſs* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten load of timber, or to pay a ſtated price for certain goods. *Implied* are ſuch as reaſon and juſtice dictate, and which therefore the law preſumes that every man undertakes to perform. As, if I employ a perſon to do any buſineſs for me, or perform any work; the law implies that I undertook, or contracted, to pay him as much as his labour deſerves. If I take up wares from a tradeſman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is alſo one ſpecies of implied contracts, which runs through and is annexed to all other contracts, conditions, and covenants, *viz.* that if I fail in my part of the agreement, I ſhall pay the other party ſuch damages as he has ſuſtained by ſuch my neglect or refuſal. In ſhort, almoſt all the rights of perſonal property (when not in actual poſſeſſion) do in great meaſure depend upon contracts of one kind or other, at leaſt might be reduced under ſome of them: which indeed is the method taken by the civil law; it having referred the greateſt part of the duties and rights, which it treats of, to the head of obligations *ex contractu* and *quaſi ex contractu* (g).

A CONTRACT may alſo be either *executed*, as if A agrees to change horſes with B, and they do it immediately; in which caſe the poſſeſſion and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only veſts, and their reciprocal property in each other's horſe is not in poſſeſſion but in action: for a contract *executed* (which differs nothing from a grant) conveys a *choſe in poſſeſſion*; a contract *executory* conveys only a *choſe in action*.

HAVING thus ſhewn the general nature of a contract, we are, *ſecondly*, to proceed to the *conſideration* upon which it is founded; or the reaſon which moves the party contracting to

(g) *Inſt.* 3. 14. 2.

enter

enter into the contract. "It is an agreement upon *sufficient consideration.*" The civilians hold, that in all contracts, either expreſs or implied, there muſt be ſomething given in exchange, ſomething that is mutual or reciprocal (h). This thing, which is the price or motive of the contract, we call the conſideration: and it muſt be a thing lawful in itſelf, or elſe the contract is void. A *good* conſideration, we have before ſeen (i), is that of blood or natural affection between near relations; the ſatisfaction accruing from which the law eſteems an equivalent for whatever benefit may move from one relation to another (j). This conſideration may ſometimes however be ſet aſide, and the contract become void, when it tends in its conſequences to defraud creditors or other third perſons of their juſt rights. But a contract for *any valuable* conſideration, as for marriage, for money, for work done, or for other reciprocal contracts, can never be impeached at law; and, if it be of a ſufficient adequate value, is never ſet aſide in equity: for the perſon contracted with has then given an equivalent in recompence, and is therefore as much an owner, or a creditor, as any other perſon.

These valuable conſiderations are divided by the civilians (k) into four ſpecies. 1. *Do, ut des:* as when I give money or goods, on a contract that I ſhall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promiſe of repayment; and all ſales of goods, in which there is either an expreſs contract to pay ſo much for them, or elſe the law implies a contract to pay ſo much as they are worth. 2. The ſecond ſpecies is *facio, ut facias:* as when I agree with a man to do his work for him, if he will do mine for me; or if two perſons agree to marry together; or to do any other poſitive acts on both ſides. Or, it may be to forbear on one ſide in conſideration of ſomething done on the other; as, that in conſideration A, the tenant, will repair his houſe, B, the landlord, will not ſue him for waſte. Or, it may be for mutual forbearance on both ſides; as, that in

(h) *In omnibus contractibus, ſive nominatis, ſive innominatis, permutatio continetur.* Gravin. *l.* 2, §. 12.

(i) page 297.

(j) 3 Rep. 83.

(k) *Ff.* 19. 5. 5. 5.

conſideration

conſideration that A will not trade to Liſbon, B will not trade to Marſeilles; ſo as to avoid interfering with each other. 3. The third ſpecies of conſideration is, *facio, ut des:* when a man agrees to perform any thing for a price, either ſpecially mentioned, or left to the determination of the law to ſet a value on it. As when a ſervant hires himſelf to his maſter, for certain wages or an agreed ſum of money: here the ſervant contracts to do his maſter's ſervice, in order to earn that ſpecific ſum. Otherwiſe, if he be hired generally; for then he is under an implied contract to perform this ſervice for what it ſhall be reaſonably worth. 4. The fourth ſpecies is, *do, ut facias:* which is the direct counterpart of the other. As when I agree with a ſervant to give him ſuch wages upon his performing ſuch work: which, we ſee, is nothing elſe but the laſt ſpecies inverted; for *ſervus facit, ut herus det*, and *herus dat, ut ſervus faciat.*

A CONSIDERATION of ſome ſort or other is ſo abſolutely neceſſary to the forming of a contract, that a *nudum pactum* or agreement to do or pay any thing on one ſide, without any compenſation on the other, is totally void in law; and a man cannot be compelled to perform it (l). As if one man promiſes to give another 100*l.* here there is nothing contracted for or given on the one ſide, and therefore there is nothing binding on the other. And, however a man may or may not be bound to perform it, in honor or conſcience, which the municipal laws do not take upon them to decide; certainly thoſe municipal laws will not compel the execution of what he had no viſible inducement to engage for: and therefore our law has adopted (m) the maxim of the civil law (n), that *ex nudo pacto non oritur actio.* But any degree of reciprocity will prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation, (as a promiſe to pay a juſt debt, though barred by the ſtatute of limitations) it is no longer *nudum pactum.* And as this rule was principally eſtabliſhed, to avoid the inconvenience that would ariſe from ſetting up mere verbal promiſes,

(l) Dr. & St. d. 2. c. 24.
(m) Bro. *Abr. tit. dette.* 79. Salk. 129.
(n) *Cod.* 2. 3. 10. & 5. 14. 1.

for

for which no good reaſon could be aſſigned (o), it therefore does not hold in ſome caſes, where ſuch promiſe is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promiſſory note, he ſhall not be allowed to aver the want of a conſideration in order to evade the payment: for every bond from the ſolemnity of the inſtrument (p), and every note from the ſubſcription of the drawer (q), carries with it an internal evidence of a good conſideration. Courts of juſtice will therefore ſupport them both, as againſt the contractor himſelf; but not to the prejudice of creditors, or ſtrangers to the contract.

WE are next to conſider, *thirdly*, the thing agreed to be done or omitted. "A contract is an agreement, upon ſuffi-"cient conſideration, *to do or not to do a particular thing.*" The moſt uſual contracts, whereby the right of chattels perſonal may be acquired in the laws of England, are, 1. That of *ſale* or *exchange*. 2. That of *bailment*. 3. That of *hiring* and *borrowing*. 4. That of *debt*.

1. SALE or *exchange* is a tranſmutation of property from one man to another, in conſideration of ſome recompence in value: for there is no ſale without a recompence; there muſt be *quid pro quo* (r). If it be a commutation of goods for goods, it is more properly an *exchange*; but if it be a transferring of goods for money, it is called a *ſale*: which is a method of exchange introduced for the convenience of mankind, by eſtabliſhing an univerſal medium, which may be exchanged for all ſorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjuſt the reſpective values, and the carriage would be intolerably cumberſome. All civilized nations adopted therefore very early the uſe of money; for we find Abraham giving "four hundred ſhekels of ſilver, current "money with the merchant," for the field of Machpelah (s); though the practice of exchanges ſtill ſubſiſts among

(o) Plowd. 308, 309.
(p) Hardr. 200. 1 Ch. Rep. 157.
(q) Lord Raym. 760.
(r) Noy's Max. c. 42.
(s) Gen. c. 23. v. 16.

ſeveral

ſeveral of the ſavage nations. But with regard to the *law* of ſales and exchanges, there is no difference. I ſhall therefore treat of them both under the denomination of ſales only; and ſhall conſider their force and effect, in the firſt place where the vendor *hath* in himſelf, and ſecondly where he *hath not*, the property of the thing ſold.

WHERE the vender *hath* in himſelf the property of the goods ſold, he hath the liberty of diſpoſing of them to whomever he pleaſes, at any time, and in any manner: unleſs judgment has been obtained againſt him for a debt or damages, and the writ of execution is actually delivered to the ſheriff. For then, by the ſtatute of frauds (s), the ſale ſhall be looked upon as fraudulent, and the property of the goods ſhall be bound to anſwer the debt, from the time of delivering the writ. Formerly it was bound from the *teſte*, or iſſuing of the writ (t), and any ſubſequent ſale was fraudulent; but the law was thus altered in favour of *purchaſors*, though it ſtill remains the ſame between the *parties:* and therefore, if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors (v).

IF a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no ſale without payment, unleſs the contrary be expreſsly agreed. And therefore, if the vendor ſays, the price of a beaſt is four pounds, and the vendee ſays he will give four pounds, the bargain is ſtruck; and they neither of them are at liberty to be off, provided immediate poſſeſſion be tendered by the other ſide. But if neither the money be paid, nor the goods delivered, nor tender made, nor any ſubſequent agreement be entered into, it is no contract, and the owner may diſpoſe of the goods as he pleaſes (u). But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of *earneſt* (which the civil law calls *arrha*, and interprets to be "*emptionis-venditionis*

(s) 29 Car. II. c. 3.
(t) 8 Rep. 171. 1 Mod. 188.
(v) Comb. 33. 12 Mod. 5. 7 Mod. 95.
(u) Hob. 41. Noy's Max. c. 42.

"*con-*

"*contractae argumentum* (w)" the property of the goods is abſolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them (x). And ſuch regard does the law pay to earneſt as an evidence of a contract, that, by the ſame ſtatute 29 Car. II. c. 3. no contract for the ſale of goods, to the value of 10*l.* or more, ſhall be valid, unleſs the buyer actually receives part of the goods ſold, by way of earneſt on his part; or unleſs he gives part of the price to the vendor by way of earneſt to bind the bargain, or in part of payment; or unleſs ſome note in writing be made and ſigned by the party, or his agent, who is to be charged with the contract. And, with regard to goods under the value of 10*l.* no contract or agreement for the ſale of them ſhall be valid, unleſs the goods are to be delivered within one year, or unleſs the contract be made in writing, and ſigned by the party who is to be charged therewith. Antiently, among all the northern nations, ſhaking of hands was held neceſſary to bind the bargain; a cuſtom which we ſtill retain in many verbal contracts. A ſale thus made was called *handſale*, "*venditio per mutuam manuum complexionem* (y);" till in proceſs of time the ſame word was uſed to ſignify the price or earneſt, which was given immediately after the ſhaking of hands, or inſtead thereof.

As ſoon as the bargain is ſtruck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, untill he renders the price agreed on (z). But if he tenders the money to the vendor, and he refuſes it, the vendee may ſeiſe the goods, or have an action againſt the vendor for detaining them. And by a regular ſale, without delivery, the property is ſo abſolutely veſted in the vendee, that if A ſells a horſe to B for 10*l.*, and B pays him earneſt, or ſigns a note in writing of the bargain; and afterwards, before the delivery of the horſe or money paid, the horſe dies in the vendor's cuſtody; ſtill he is entitled to the money, becauſe by the

(w) *Inſt.* 3. *tit.* 24.
(x) Noy, *ibid.*
(y) Stiernhook *de jure Goth. l.* 2. *c.* 5.
(z) Hob. 41.

contract

contract, the property was in the vendee (a). Thus may property in goods be transferred by ſale, where the vendor *hath* ſuch property in himſelf.

BUT property may alſo in ſome caſes be transferred by ſale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be ſecure of his purchaſe; otherwiſe all commerce between man and man muſt ſoon be at an end. And therefore the general rule of law is (b), that all ſales and contracts of any thing vendible, in fairs or markets *overt*, (that is, open) ſhall not only be good between the parties, but alſo be binding on all thoſe that have any right or property therein. And for this purpoſe, the mirror informs us (c), were tolls eſtabliſhed in markets, viz. to teſtify the making of contracts; for every private contract was diſcountenanced by law. Wherefore our Saxon anceſtors prohibited the ſale of any thing above the value of twenty-pence, unleſs in open market, and directed every bargain and ſale to be contracted in the preſence of credible witneſſes (d). Market overt in the country is only held on the ſpecial days, provided for particular towns by charter or preſcription: but in London every day, except Sunday, is market day (e). The market place, or ſpot of ground ſet apart by cuſtom for the ſale of particular goods, is alſo in the country the only market overt (f); but in London every ſhop in which goods are expoſed publicly to ſale, is market overt, for ſuch things only as the owner profeſſes to trade in (g). But if my goods are ſtolen from me, and ſold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expreſsly provided by ſtatute 1 Jac. I. c. 21. that the ſale of any goods wrongfully taken, to any pawnbroker in London or within two miles thereof, ſhall not alter the property. For this, being uſually a clandeſtine trade, is

(a) Noy, *c.* 42.
(b) 2 Inſt. 713.
(c) *c.* 1. §. 3.
(d) *LL. Ethel.* 10, 12. *LL. Eadg.* Wilk. 80.
(e) Cro. Jac. 68.
(f) Godb. 131.
(g) 5 Rep. 83. 12 Mod. 521.

therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, ſuch ſale (though regular in all other reſpects) will in no caſe bind him; though it binds infants, feme coverts, ideots or lunatics, and men beyond ſea or in priſon: or if the goods be ſtolen from a common perſon, and then taken by the king's officer from the felon, and ſold in open market; ſtill, if the owner has uſed due diligence in proſecuting the thief to conviction, he loſes not his property in the goods (h). So likewiſe, if the buyer knoweth the property not to be in the ſeller; or there be any other fraud in the tranſaction; if he knoweth the ſeller to be an infant, or feme covert, not uſually trading for herſelf; if the ſale be not originally and wholly made in the fair or market, or not at the uſual hours; the owner's property is not bound thereby (i). If a man buys his own goods in a fair or market, the contract of ſale ſhall not bind him ſo as that he ſhall render the price, unleſs the property had been previouſly altered by a former ſale (k). And, notwithſtanding any number of intervening ſales, if the original vendor, who ſold without having the property, come again into poſſeſſion of the goods, the original owner may take them, when found in his hands who was guilty of the firſt breach of juſtice (l). By which wiſe regulations the common law has ſecured the right of the proprietor in perſonal chattels from being deveſted, ſo far as was conſiſtent with that other neceſſary policy, that purchaſors, *bona fide*, in a fair, open, and regular manner, ſhould not be afterwards put to difficulties by reaſon of the previous knavery of the ſeller.

BUT there is one ſpecies of perſonal chattels, in which the property is not eaſily altered by ſale, without the expreſs conſent of the owner, and thoſe are horſes; the ſale of which, even in fairs or markets overt, is void in many inſtances, where that of other property is valid: becauſe a horſe is ſo fleet an animal, that the ſtealers of them may fly far off

(h) Bacon's uſe of the law. 158.
(i) 2 Inſt. 713, 714.
(k) Perk. §. 93.
(l) 2 Inſt. 713.

in

in a ſhort ſpace (m), and be out of the reach of the moſt induſtrious owner. All perſons therefore that have occaſion to deal in horſes, and are therefore liable ſometimes to buy ſtolen ones, would do well to obſerve, that whatever price they may give, or how long ſoever they may keep poſſeſſion before it be claimed, they gain no property in a horſe that has been ſtolen, unleſs it be bought in a fair or market overt; nor even then, unleſs the directions be purſued that are laid down in the ſtatutes 2 P. & M. c. 7. and 31 Eliz. c. 12. By which it is enacted, that every horſe, ſo to be ſold, ſhall be openly expoſed, in the time of ſuch fair or market, for one whole hour together, between ten in the morning and ſunſet, in the open and public place uſed for ſuch ſales, and not in any private yard or ſtable: that the horſe ſhall be brought by both the vendor and vendee to the toll-gatherer or book-keeper of ſuch fair or market: that toll be paid, if any be due; and if not, one penny to the book-keeper, who ſhall enter down the price, colour, and marks of the horſe, with the names, additions, and abode of the vendee and the vendor; the latter either upon his own knowledge, or the teſtimony of ſome credible witneſs. And, even if all theſe points be fully complied with, yet ſuch ſale ſhall not take away the property of the owner, if within ſix months after the horſe is ſtolen he puts in his claim before the mayor, or ſome juſtice, of the diſtrict in which the horſe ſhall be found; and within forty days after that, proves ſuch his property by the oath of two witneſſes before ſuch mayor or juſtice; and alſo tenders to the perſon in poſſeſſion ſuch price as he *bona fide* paid for him in market overt. But in caſe any one of the points before-mentioned be omitted, or not obſerved in the ſale, ſuch ſale is utterly void; and the owner ſhall not loſe his property, but at any diſtance of time may ſeize or bring an action for his horſe, wherever he happens to find him. Wherefore ſir Edward Coke obſerves (n), that, both by the common law and theſe two ſtatutes, the property of horſes is ſo well preſerved, that if the owner be of capacity to underſtand them, and be vigilant and induſtrious to purſue the

(m) 2 *Inſt.* 714. (n) *Ibid.* 719.

fame, it is almoſt impoſſible that the property of any horſe, either ſtolen or not ſtolen, ſhould be altered by any ſale in market overt by him that is *malae fidei poſſeſſor*.

By the civil law (o) an implied warranty was annexed to every ſale, in reſpect to the title of the vendor: and ſo too, in our law, a purchaſor of goods and chattels may have a ſatisfaction from the ſeller, if he ſells them as his own, and the title proves deficient, without any expreſs warranty for that purpoſe (p). But with regard to the goodneſs of the wares ſo purchaſed, the vendor is not bound to anſwer; unleſs he expreſsly warrants them to be ſound and good (q), or unleſs he knew them to be otherwiſe, and hath uſed any art to diſguiſe them (r), or unleſs they turn out to be different from what he repreſented to the buyer.

2. BAILMENT, from the French *bailler*, to deliver, is a delivery of goods in truſt, upon a contract expreſſed or implied, that the truſt ſhall be faithfully executed on the part of the bailee. As if cloth be delivered, or (in our legal dialect) bailed, to a taylor to make a ſuit of cloaths, he has it upon an implied contract to render it again when made, and that in a workmanly manner (s). If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the perſon appointed (t). If a horſe, or other goods, be delivered to an inn-keeper or his ſervants, he is bound to keep them ſafely, and reſtore them when his gueſt leaves the houſe (u). If a man takes in a horſe, or other cattle, to graze and depaſture in his grounds, which the laws calls *agiſtment*, he takes them upon an implied contract to return them ſafe to the owner (w). If a pawnbroker receives plate or jewels as a pledge, or ſecurity, for the repayment of money lent thereon at a day certain, he has them upon an expreſs contract or condition to reſtore them, if the pledgor performs his part by redeeming them in due time (x): for the due

(o) *Ff.* 21. 2. 1.
(p) Cro. Jac. 474. 1 Roll. Abr. 90.
(q) F. N. B. 94.
(r) 2 Roll. Rep. 5.
(s) 1 Vern. 268.
(t) 12 Mod. 482.
(u) Cro. Eliz. 622.
(w) Cro. Car. 271.
(x) Cro Jac. 245. Yelv. 178.

execution

execution of which contract many uſeful regulations are made by ſtatute 30 Geo. II. c. 24. And ſo if a landlord diſtreins goods for rent, or a pariſh officer for taxes, theſe for a time are only a pledge in the hands of the diſtreinors, and they are bound by an implied contract in law to reſtore them on payment of the debt, duty, and expences, before the time of ſale; or, when ſold, to render back the overplus. If a friend delivers any thing to his friend to keep for him, the receiver is bound to reſtore it on demand: and it was formerly held that in the mean time he was anſwerable for any damage or loſs it might ſuſtain, whether by accident or otherwiſe (y); unleſs he expreſsly undertook (z) to keep it only with the ſame care as his own goods, and then he ſhould not be anſwerable for theft or other accidents. But now the law ſeems to be ſettled upon a much more rational footing (a); that ſuch a general bailment will not charge the bailee with any loſs, unleſs it happens by groſs neglect, which is conſtrued to be an evidence of fraud: but, if the bailee undertakes ſpecially to keep the goods ſafely and ſecurely, he is bound to anſwer all perils and damages, that may befall them for want of the ſame care with which a prudent man would keep his own (b).

IN all theſe inſtances there is a ſpecial qualified property transferred from the bailor to the bailee, together with the poſſeſſion. It is not an abſolute property in the bailee, becauſe of his contract for reſtitution; and the bailor hath nothing left in him but the right to a *choſe* in action, grounded upon ſuch contract, the poſſeſſion being delivered to the bailee. And, on account of this qualified property of the bailee, he may, (as well as the bailor) maintain an action againſt ſuch as injure or take away theſe chattels. The taylor, the carrier, the innkeeper, the agiſting farmer, the pawnbroker,

(y) Co. Litt. 89.
(z) 4 Rep. 84.
(a) Lord Raym. 909. 12 Mod. 487.
(b) By the laws of Sweden, the depoſitary or bailee of goods is not bound to reſtitution, in caſe of accident by fire or theft: provided his own goods periſhed in the ſame manner: "*jura enim noſtra*, ſays Stiernhook, *de-lum praeſumunt, ſi una non pereunt.*" (*De jure Sueon. l.* 2. *c.* 5.)

the diſtreinor, and the general bailee, may all of them vindicate, in their own right, this their poſſeſſory intereſt, againſt any ſtranger or third perſon (c). For, as ſuch bailee is reſponſible to the bailor, if the goods are loſt or damaged by his wilful default or groſs negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reaſonable that he ſhould have a right to recover either the ſpecific goods, or elſe a ſatisfaction in damages, againſt all other perſons, who may have purloined or injured them; that he may always be ready to anſwer the call of the bailor.

3. HIRING and *borrowing* are alſo contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference, that hiring is always for a price, a ſtipend, or additional recompenſe; borrowing is merely gratuitous. But the law in both caſes is the ſame. They are both contracts, whereby the poſſeſſion and a tranſient property is transferred for a particular time or uſe, on condition and agreement to reſtore the goods ſo hired or borrowed, as ſoon as the time is expired or uſe performed; together with the price or ſtipend (in caſe of hiring) either expreſsly agreed on by the parties, or left to be implied by law according to the value of the ſervice. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to uſe it with moderation and not abuſe it; and the owner or lender retains a reverſionary intereſt in the ſame, and acquires a new property in the price or reward. Thus if a man hires or borrows a horſe for a month, he has the poſſeſſion and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner becomes (in caſe of hiring) intitled to the premium or price, for which the horſe was hired (d.)

THERE is one ſpecies of this price or reward, the moſt uſual of any, but concerning which many good and learned

(c) 13 Rep. 69. (d) Yelv. 172. Cro. Jac. 236.

men

men have in former times very much perplexed themſelves and other people, by raiſing doubts about its legality *in foro conſcientiae*. That is, when money is lent on a contract to receive not only the principal ſum again, but alſo an encreaſe by way of compenſation for the uſe; which is generally called *intereſt* by thoſe who think it lawful, and *uſury* by thoſe who do not ſo. It may not be amiſs therefore to enter into a ſhort enquiry, upon what footing this matter of intereſt or uſury does really ſtand.

THE enemies to intereſt in general make no diſtinction between that and uſury, holding any increaſe of money to be indefenſibly uſurious. And this they ground as well on the prohibition of it by the law of Moſes among the Jews, as alſo upon what is laid down by Ariſtotle (e), that money is naturally barren, and to make it breed money is prepoſterous, and a perverſion of the end of its inſtitution, which was only to ſerve the purpoſes of exchange, and not of increaſe. Hence the ſchool divines have branded the practice of taking intereſt, as being contrary to the divine law both natural and revealed; and the canon law (f), has proſcribed the taking any, the leaſt, increaſe for the loan of money as a mortal ſin.

BUT, in anſwer to this, it may be obſerved, that the moſaical precept was clearly a political, and not a moral precept. It only prohibited the Jews from taking uſury from their brethren the Jews; but in expreſs words permitted them to take it of a ſtranger (g): which proves that the taking of moderate uſury, or a reward for the uſe, for ſo the word ſignifies, is not *malum in ſe*, ſince it was allowed where any but an Iſraelite was concerned. And as to Ariſtotle's reaſon, deduced from the natural barrenneſs of money, the ſame may with equal force be alledged of houſes, which never breed houſes; and twenty other things, which nobody doubts it is lawful to make profit of, by letting

(e) *Polit. l.* 1. *c.* 10.
(f) *Decretal. l.* 5. *tit.* 19.
(g) "Unto a ſtranger thou mayeſt "lend upon uſury, but unto thy bro-"ther thou ſhalt not lend upon uſu-"ry." Deut. xxiii. 20.

them to hire. And though money was originally uſed only for the purpoſes of exchange, yet the laws of any ſtate may be well juſtified in permitting it to be turned to the purpoſes of profit, if the convenience of ſociety (the great end for which money was invented) ſhall require it. And that the allowance of moderate intereſt tends greatly to the benefit of the public, eſpecially in a trading country, will appear from that generally acknowledged principle, that commerce cannot ſubſiſt without mutual and extenſive credit. Unleſs money therefore can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few perſons would care to lend it; or at leaſt the eaſe of borrowing at a ſhort warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkiſh ſuperſtition and civil tyranny, when intereſt was laid under a total interdict, commerce was alſo at its loweſt ebb, and fell entirely into the hands of the Jews and Lombards: but when mens minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itſelf its inſeparable companion, the doctrine of loans upon intereſt.

AND, really, conſidered abſtractedly from this its uſe, ſince all other conveniences of life may either be bought or hired, but money can only be hired, there ſeems no greater impropriety in taking a recompenſe or price for the hire of this, than of any other convenience. If I borrow 100*l.* to employ in a beneficial trade, it is but equitable that the lender ſhould have a proportion of my gains. To demand an exorbitant price is equally contrary to conſcience, for the loan of a horſe, or the loan of a ſum of money: but a reaſonable equivalent for the temporary inconvenience the owner may feel by the want of it, and for the hazard of his loſing it entirely, is not more immoral in one caſe than it is in the other. And indeed the abſolute prohibition of lending upon any, even moderate intereſt, introduces the very inconvenience which it ſeems meant to remedy. The neceſſity of individuals will make borrowing unavoidable.

Without

Without ſome profit allowed by law there will be but few lenders: and thoſe principally bad men, who will break through the law, and take a profit; and then will endeavour to indemnify themſelves from the danger of the penalty, by making that profit exorbitant. Thus, while all degrees of profit were diſcountenanced, we find more complaints of uſury, and more flagrant inſtances of oppreſſion, than in modern times, when money may be eaſily had at a low intereſt. A capital diſtinction muſt therefore be made between a moderate and exorbitant profit; to the former of which we uſually give the name of intereſt, to the latter the truly odious appellation of uſury: the former is neceſſary in every civil ſtate, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated ſociety. For, as the whole of this matter is well ſummed up by Grotius (h), "if the compenſation allowed by law does "not exceed the proportion of the hazard run, or the want "felt, by the loan, its allowance is neither repugnant to "the revealed nor the natural law: but if it exceeds thoſe "bounds, it is then oppreſſive uſury; and though the mu-"nicipal laws may give it impunity, they never can make "it juſt."

We ſee, that the exorbitance or moderation of intereſt, for money lent, depends upon two circumſtances; the inconvenience of parting with it for the preſent, and the hazard of loſing it entirely. The inconvenience to individual lenders can never be eſtimated by laws; the rate therefore of general intereſt muſt depend upon the uſual or general inconvenience. This reſults entirely from the quantity of ſpecie or current money in the kingdom: for, the more ſpecie there is circulating in any nation, the greater ſuperfluity there will be beyond what is neceſſary to carry on the buſineſs of exchange and the common concerns of life. In every nation or public community there is a certain quantity of money thus neceſſary; which a perſon well ſkilled in political arithmetick might perhaps calculate as exactly, as a private banker can the demand for running caſh in his

(h) *de j. b. & p. l.* 2. *c.* 12. § 22.

own

own ſhop: all above this neceſſary quantity may be ſpared, or lent, without much inconvenience to the reſpective lenders; and the greater this national ſuperfluity is, the more numerous will be the lenders, and the lower ought the rate of the national intereſt to be: but where there is not enough, or barely enough, circulating caſh, to anſwer the ordinary uſes of the public, intereſt will be proportionably high; for lenders will be but few, as few can ſubmit to the inconvenience of lending.

So alſo the hazard of an entire loſs has its weight in the regulation of intereſt: hence, the better the ſecurity, the lower will the intereſt be; the rate of intereſt being generally in a compound *ratio*, formed out of the inconvenience and the hazard. And as, if there were no inconvenience, there ſhould be no intereſt, but what is equivalent to the hazard; ſo, if there were no hazard, there ought to be no intereſt, ſave only what ariſes from the mere inconvenience of lending. Thus, if the quantity of ſpecie in a nation be ſuch, that the general inconvenience of lending for a year is computed to amount to *three per cent.* a man that has money by him will perhaps lend it upon good perſonal ſecurity at *five per cent.* allowing two for the hazard run; he will lend it upon landed ſecurity, or mortgage, at *four per cent*, the hazard being proportionably leſs; but he will lend it to the ſtate, on the maintenance of which all his property depends, at *three per cent.* the hazard being none at all.

BUT ſometimes the hazard may be greater, than the rate of intereſt allowed by law will compenſate. And this gives riſe to the practiſe, 1. Of bottomry, or *reſpondentia*. 2. Of policies of inſurance.

AND firſt, *bottomry* (which originally aroſe from permitting the maſter of a ſhip, in a foreign country, to hypothecate the ſhip in order to raiſe money to refit) is in the nature of a mortgage of a ſhip; when the owner takes up money to enable him to carry on his voyage, and pledges the

keel or *bottom* of the ſhip *(pars pro toto)* as a ſecurity for the repayment. In which caſe it is underſtood, that, if the ſhip be loſt, the lender loſes alſo his whole money; but, if it returns in ſafety, then he ſhall receive back his principal, and alſo the premium or intereſt agreed upon, however it may exceed the legal rate of intereſt. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reaſon of the extraordinary hazard run by the lender (i). And in this caſe the ſhip and tackle, if brought home, are anſwerable (as well as the perſon of the borrower) for the money lent. But if the loan is not upon the veſſel, but upon the goods and merchandize, which muſt neceſſarily be ſold or exchanged in the courſe of the voyage, then only the borrower, perſonally, is bound to anſwer the contract; who therefore in this caſe is ſaid to take up money at *reſpondentia*. Theſe terms are alſo applied to contracts for the repayment of money borrowed, not on the ſhip and goods only, but on the mere hazard of the voyage itſelf; when a man lends a merchant 1000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary intereſt, in caſe ſuch a voyage be ſafely performed (k): which kind of agreement is ſometimes called *foenus nauticum*, and ſometimes *uſura maritima* (l). But, as this gave an opening for uſurious and gaming contracts, eſpecially upon long voyages, it was enacted by the ſtatute 19 Geo. II. c. 37. that all monies lent on bottomry or at *reſpondentia*, on veſſels bound to or from the Eaſt Indies, ſhall be expreſsly lent only upon the ſhip or upon the merchandize; that the lender ſhall have the benefit of ſalvage; and that if the borrower has not on board effects to the value of the ſum borrowed, he ſhall be reſponſible to the lender for ſo much of the principal as hath not been laid out, with legal intereſt and all other charges, though the ſhip and merchandize be totally loſt.

(i) Moll. *de jur. mar.* 361. Malyne *lex mercat.* b. 1. c. 31. Cro. Jac. 208. Bynkerſh. *quaeſt. jur. privat.* l. 3. c. 16.

(k) 1 Sid. 27.

(l) Molloy *ibid.* Malyne *ibid.*

SECONDLY,

SECONDLY, a policy of *insurance* is a contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interests upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent*; here I calculate the chance that she performs her voyage to be twenty to one against her being lost: and, if she be lost, I lose 100*l.* and get 5*l.* Now this is much the same as if I lend the merchant, whose whole fortunes are embarked in this vessel, 100*l.* at the rate of *eight per cent.* For by a loan I should be immediately out of my money, the inconvenience of which we have computed equal to *three per cent:* if therefore I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard; which together would have made 8*l.* But as, upon an insurance, I am never out of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principal of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution. Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.* which is therefore the legal interest: but there is also a special hazard in this case; for, if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more; and therefore that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to avoid abuses, will not permit to be taken: Sempronius therefore gives Titius the lender only 5*l.* the legal interest: but applies to Gaius an insurer, and gives him the other 10*l.* to indemnify Titius against

againſt the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided againſt, which the eſtabliſhed rate of intereſt will not reach; that being calculated by the ſtate to anſwer only the ordinary and general hazard, together with the lender's inconvenience in parting with his ſpecie for the time.

THE learning relating to marine inſurances hath of late years been greatly improved by a ſeries of judicial deciſions, which have now eſtabliſhed the law in ſuch a variety of caſes, that (if well and judiciouſly collected) they would form a very complete title in a code of commercial juriſprudence. But, being founded on equitable principles, which chiefly reſult from the ſpecial circumſtances of the caſe, it is not eaſy to reduce them to any general heads in mere elementary inſtitutes. Thus much may however be ſaid; that, being contracts, the very eſſence of which conſiſts in obſerving the pureſt good faith and integrity, they are vacated by any the leaſt ſhadow of fraud or undue concealment; and, on the other hand, being much for the benefit and extenſion of trade, by diſtributing the loſs or gain among a number of adventurers, they are greatly encouraged and protected both by common law and acts of parliament. But, as a practice had obtained of inſuring large ſums without having any property on board, which were called inſurances, *intereſt or no intereſt*; and alſo of inſuring the ſame goods ſeveral times over; both of which were a ſpecies of gaming, without any advantage to commerce, and were denominated *wagering* policies: it is therefore enacted by the ſtatute 19 Geo. II. c. 37. that all inſurances, intereſt or no intereſt, or without farther proof of intereſt than the policy itſelf, or by way of gaming or wagering, or without benefit of ſalvage to the inſurer, (all which had the ſame pernicious tendency) ſhall be totally null and void, except upon privateers, or ſhips in the Spaniſh and Portugueſe trade, for reaſons ſufficiently obvious; and that no re-aſſurance ſhall be lawful, except the former inſurer ſhall be inſolvent, a bankrupt, or dead; and laſtly that, in the Eaſt India trade, the lender of money on bottomry, or at

reſpon-

reſpondentia, ſhall alone have a right to be inſured for the money lent, and the borrower ſhall (in caſe of a loſs) recover no more upon any inſurance than the ſurplus of his property, above the value of his bottomry or *reſpondentia* bond. But, to return to the doctrine of common intereſt on loans:

UPON the two principles of inconvenience and hazard, compared together, different nations have at different times, eſtabliſhed different rates of intereſt. The Romans at one time allowed *centeſimae*, or *twelve per cent.* to be taken for common loans; but Juſtinian (m) reduced it to *trientes*, or one third of the *as* or *centeſimae*, that is, *four per cent*; but allowed higher intereſt to be taken of merchants, becauſe there the hazard was greater (n). So too Grotius informs us

(m) *Cod.* 4. 32. 26. *Nov.* 33, 34, 35.

(n) A ſhort explication of theſe terms, and of the diviſion of the Roman *as*, will be uſeful to the ſtudent, not only for underſtanding the civilians, but alſo the more claſſical writers, who perpetually refer to this diſtribution. Thus Horace, *ad Piſones*. 325.

Romani pueri longis rationibus aſſem
Diſcunt in partes centum *diducere. Dicat*
Filius Albini, ſi de quincunce *remota eſt*
Uncia, *quid ſuperet? poteràt dixiſſe*, triens: *eu,*
Rem poteris ſervare tuam! redit uncia, *quid ſit?*
Semis.———

It is therefore to be obſerved, that, in calculating the rate of intereſt, the Romans divided the principal ſum into an *hundred* parts; one of which they allowed to be taken monthly: and this, which was the higheſt rate of intereſt permitted, they called *uſurae centeſimae*, amounting yearly to twelve *per cent.* Now as the *as*, or Roman pound, was commonly uſed to expreſs any integral ſum, and was diviſible into twelve parts or *unciae*, therefore theſe twelve monthly payments or *unciae*, were held to amount annually to one pound, or *as uſurarius*; and ſo the *uſurae aſſes* were ſynonimous to the *uſurae centeſimae*. And all lower rates of intereſt were denominated according to the relation they bore to this centeſimal uſury, or *uſurae aſſes*: for the ſeveral multiples of the *unciae*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *ſextans, quadrans, triens, quincunx, ſemis, ſeptunx, bes, dodrans, dextrans, deunx*, containing reſpectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 *unciae* or duodecimal parts of an *as*, (*Ff.* 28. 5. 50. § 2. Gravin. *orig. jur. civ. l.* 2. § 47.) This being premiſed, the following table will clearly exhibit at once the ſubdiviſions of the *as*, and the denominations of the rate of intereſt.

USURAE

us (o), that in Holland the rate of intereſt was then eight *per cent.* in common loans, but twelve to merchants. Our law eſtabliſhes one ſtandard for all alike, where the pledge or ſecurity itſelf is not put in jeopardy; leſt, under the general pretence of vague and indeterminate hazards, a door ſhould be opened to fraud and uſury: leaving ſpecific hazards to be provided againſt by ſpecific inſurances, or by loans upon *reſpondentia*, or bottomry. But as to the rate of legal intereſt, it has varied and decreaſed for two hundred years paſt, according as the quantity of ſpecie in the kingdom has encreaſed by acceſſions of trade, the introduction of paper credit, and other circumſtances. The ſtatute 37 Hen. VIII. c. 9. confined intereſt to ten *per cent.* and ſo did the ſtatute 13 Eliz. c. 8. But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, ſo under her ſucceſſor the ſtatute 21 Jac. I. c. 17. reduced it to eight *per cent*; as did the ſtatute 12 Car. II. c. 13, to ſix: and laſtly by the ſtatute 12 Ann. ſt. 2. c. 16. it was brought down to five *per cent.* yearly, which is now the extremity of legal intereſt that can be taken. But yet, if a contract, which carries intereſt, be made in a foreign country, our courts will direct the payment of intereſt according to the law of that country in which the contract was made (p). Thus Iriſh, American,

USURAE.	PARTES ASSIS.	PER ANNUM.
Aſſes, ſive centeſimae	*integer.*	12 *per cent.*
Deunces	$\frac{11}{12}$	11
Dextances, vel decunces	$\frac{5}{6}$	10
Dodrantes	$\frac{3}{4}$	9
Beſſes	$\frac{2}{3}$	8
Septunces	$\frac{7}{12}$	7
Semiſſes	$\frac{1}{2}$	6
Quincunces	$\frac{5}{12}$	5
Trientes	$\frac{1}{3}$	4
Quadrantes	$\frac{1}{4}$	3
Sextances	$\frac{1}{6}$	2
Unciae	$\frac{1}{12}$	1

(o) *de jur. b. & p.* 2. 12. 22.

(p) 1 Equ. Caſ. abr. 289. 1 P. Wms. 395.

Turkiſh,

Turkiſh, and Indian intereſt, have been allowed in our courts, to the amount of even twelve *per cent.* For the moderation or exorbitance of intereſt depends upon local circumſtances; and the refuſal to inforce ſuch contracts would put a ſtop to all foreign trade.

4. THE laſt general ſpecies of contracts, which I have to mention, is that of *debt*; whereby a *choſe* in action, or right to a certain ſum of money, is mutually acquired and loſt (q). This may be the counterpart of, and ariſe from, any of the other ſpecies of contracts. As, in caſe of a ſale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the ſum agreed on; and the vendor has a property in this price, as a *choſe* in action, by means of this contract of debt. In bailment, if the bailee loſes or detains a ſum of money bailed to him for any ſpecial purpoſe, he becomes indebted to the bailor in the ſame numerical ſum, upon his implied contract, that he ſhall execute the truſt repoſed in him, or repay the money to the bailor. Upon hiring or borrowing, the hirer or borrower, at the ſame time that he acquires a property in the thing lent, may alſo become indebted to the lender, upon his contract to reſtore the money borrowed, to pay the price or premium of the loan, the hire of the horſe, or the like. Any contract in ſhort whereby a determinate ſum of money becomes due to any perſon, and is not paid but remains in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquiſition; being uſually divided into debts of *record*, debts by *ſpecial*, and debts by *ſimple* contract.

A DEBT of *record* is a ſum of money, which appears to be due by the evidence of a court of record. Thus, when any ſpecific ſum is adjudged to be due from the defendant to the plaintiff, on an action or ſuit at law; this is a contract of the higheſt nature, being eſtabliſhed by the ſentence of a court of judicature. Recognizances alſo are a ſum of money, recognized or acknowledged to be due to the

(q) F. N. B. 119.

crown

crown or a ſubject, in the preſence of ſome court or magiſtrate, with a condition that ſuch acknowledgment ſhall be void upon the appearance of the party, his good behaviour, or the like: and theſe, together with ſtatutes merchant and ſtatutes ſtaple, *&c.* if forfeited by non-performance of the condition, are alſo ranked among this firſt and principal claſs of debts, *viz.* debts of record; ſince the contract, on which they are founded, is witneſſed by the higheſt kind of evidence, *viz.* by matter of record.

DEBTS by *ſpecialty*, or ſpecial contracts, are ſuch whereby a ſum of money becomes, or is acknowledged to be, due by deed or inſtrument under ſeal. Such as by deed of covenant, by deed of ſale, by leaſe reſerving rent, or by bond or obligation: which laſt we took occaſion to explain in the twentieth lecture of the preſent book; and then ſhewed that it is an acknowledgment or creation of a debt from the obligor to the obligee, unleſs the obligor performs a condition thereunto uſually annexed, as the payment of rent or money borrowed, the obſervance of a covenant, and the like; on failure of which the bond becomes forfeited, and the debt becomes due in law. Theſe are looked upon as the next claſs of debts after thoſe of record, being confirmed by ſpecial evidence, under ſeal.

DEBTS by *ſimple contract* are ſuch, where the contract upon which the obligation ariſes is neither aſcertained by matter of record, nor yet by deed or ſpecial inſtrument; but by mere oral evidence, the moſt ſimple of any: or by notes unſealed, which are capable of a more eaſy proof, and (therefore only) better, than a verbal promiſe. It is eaſy to ſee into what a vaſt variety of obligations this laſt claſs may be branched out, through the numerous contracts for money, which are not only expreſſed by the parties, but virtually implied in law. Some of theſe we have already occaſionally hinted at; and the reſt, to avoid repetition, muſt be referred to thoſe particular heads in the third book of theſe commentaries, where the breach of ſuch contracts

will be conſidered. I ſhall only obſerve at preſent, that by the ſtatute 29 Car. II. c. 3. no executor or adminiſtrator ſhall be charged upon any ſpecial promiſe to anſwer damages out of his own eſtate, and no perſon ſhall be charged upon any promiſe to anſwer for the debt or default of another, or upon any agreement in conſideration of marriage, or upon any contract or ſale of any real eſtate, or upon any agreement that is not to be performed within one year from the making, unleſs the agreement or ſome memorandum thereof be in writing, and ſigned by the party himſelf or by his authority.

BUT there is one ſpecies of debts upon ſimple contract, which, being a tranſaction now introduced into all ſorts of civil life, under the name of *paper credit*, deſerves a more particular regard. Theſe are debts by *bills of exchange*, and *promiſſory notes*.

A BILL *of exchange* is a ſecurity, originally invented among merchants in different countries, for the more eaſy remittance of money from the one to the other, which has ſince ſpread itſelf into almoſt all pecuniary tranſactions. It is an open letter of requeſt from one man to another, deſiring him to pay a ſum named therein to a third perſon on his account; by which means a man at the moſt diſtant part of the world may have money remitted to him from any trading country. If A lives in Jamaica, and owes B who lives in England 1000*l.* now if C be going from England to Jamaica, he may pay B this 1000*l.* and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any diſtance of place, by transferring it to C; who carries over his money in paper credit, without danger of robbery or loſs. This method is ſaid to have been brought into general uſe by the Jews and Lombards, when baniſhed for their uſury and other vices; in order the more eaſily to draw their effects out of France and England, into thoſe countries in which they had choſen to reſide. The invention of them was a little earlier: for the Jews were baniſhed out of Guienne in 1287, and out of England

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in 1290 (r); and in 1236 the uſe of paper credit was introduced into the Mogul empire in China (s). In common ſpeech ſuch a bill is frequently called a *draght*, but a *bill of exchange* is the more legal as well as mercantile expreſſion. The perſon however who writes this letter is called in law the *drawer*, and he to whom it is written the *drawee*; and the third perſon, or negociator, to whom it is payable (whether eſpecially named, or the *bearer* generally) is called the *payee*.

THESE bills are either *foreign*, or *inland: foreign*, when drawn by a merchant reſiding abroad upon his correſpondent in England, or *vice verſa*; and *inland*, when both the drawer and the drawee reſide within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two ſtatutes, the one 9 & 10 W. III. c. 17. the other 3 & 4 Ann. c. 9. inland bills of exchange are put upon the ſame footing as foreign ones; what was the law and cuſtom of merchants with regard to the one, and taken notice of merely as ſuch (t), being by thoſe ſtatutes expreſsly enacted with regard to the other. So that there is now in law no manner of difference between them.

PROMISSORY notes, or notes of hand, are a plain and direct engagement in writing, to pay a ſum ſpecified at the time therein limited to a perſon therein named, or ſometimes to his order, or often to the bearer at large. Theſe alſo by the ſame ſtatute 3 and 4 Ann. c. 9. are made aſſignable and indorſable in like manner as bills of exchange.

THE payee, we may obſerve, either of a bill of exchange or promiſſory note, has clearly a property veſted in him (not indeed in poſſeſſion but in action) by the *expreſs* contract of the drawer in the caſe of a promiſſory note, and, in the caſe of a bill of exchange, by his *implied* contract: *viz.* that,

(r) 2 Carte. 203. 206.
(s) Mod. Un. Hiſt. iv. 499.
(t) 1 Roll. Abr. 6.

provided the drawee does not pay the bill, the drawer will: for which reaſon it is uſual, in bills of exchange, to expreſs that the *value* thereof hath been *received* by the drawer (u); in order to ſhew the conſideration, upon which the implied contract of repayment ariſes. And this property, ſo veſted, may be transferred and aſſigned from the payee to any other man; contrary to the general rule of the common law, that no *choſe* in action is aſſignable: which aſſignment is the life of paper credit. It may therefore be of ſome uſe, to mention a few of the principal incidents attending this transfer or aſſignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other perſons, than thoſe with whom he originally contracted.

In the firſt place then the payee, or perſon to whom or whoſe *order* ſuch bill of exchange or promiſſory note is payable, may by indorſement, or writing his name *in dorſo* or on the back of it, aſſign over his whole property to the bearer, or elſe to another perſon by name, either of whom is then called the indorſee; and he may aſſign the ſame to another, and ſo on *in infinitum*. And a promiſſory note, payable to A or *bearer*, is negotiable without any indorſement, and payment thereof may be demanded by any bearer of it (v). But, in caſe of a bill of exchange, the payee, or the indorſee, (whether it be a general or particular indorſement) is to go to the drawee, and offer his bill for acceptance; which acceptance (ſo as to charge the drawer with coſts) muſt be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing (w), he then makes himſelf liable to pay it; this being now a contract on his ſide, grounded on an acknowledgment that the drawer has effects in his hands, or at leaſt credit ſufficient to warrant the payment. If the drawee refuſes to accept the bill, and it be of the value of 20*l.* or upwards, and expreſſed to be for value received, the payee or indorſee may proteſt it for *non-acceptance*: which proteſt muſt be made

(u) Stra. 1212. 4 Geo. III. B. R.
(v) 2 Show. 235.—Grant v. Vaughan. T.
(w) Stra. 1000.

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in writing, under a copy of ſuch bill of exchange, by ſome notary public; or, if no ſuch notary be reſident in the place, then by any other ſubſtantial inhabitant in the preſence of two credible witneſſes; and notice of ſuch proteſt muſt, within fourteen days after, be given to the drawer.

BUT, in caſe ſuch bill be accepted by the drawee, and after acceptance he fails or refuſes to pay it within three days after it becomes due (which three days are called days of grace) the payee or indorſee is then to get it proteſted for *non-payment*, in the ſame manner and by the ſame perſons who are to proteſt it in caſe of non-acceptance: and ſuch proteſt muſt alſo be notified, within fourteen days after, to the drawer. And he, on producing ſuch proteſt, either of non-acceptance or non-payment, is bound to make good to the payee, or indorſee, not only the amount of the ſaid bills, (which he is bound to do within a reaſonable time after non-payment, without any proteſt, by the rules of common law) (x) but alſo intereſt and all charges, to be computed from the time of making ſuch proteſt. But if no proteſt be made or notified to the drawer, and any damage accrues by ſuch neglect, it ſhall fall on the holder of the bill. The bill, when refuſed, muſt be demanded of the drawer as ſoon as conveniently may be: for though, when one draws a bill of exchange, he ſubjects himſelf to the payment, if the perſon on whom it is drawn refuſes either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the perſon to whom it is payable ſhall in convenient time give the drawer notice thereof; for otherwiſe the law will imply it paid: ſince it would be prejudicial to commerce, if a bill might riſe up to charge the drawer at any diſtance of time; when in the mean time all reckonings and accounts may be adjuſted between the drawer and the drawee (y).

IF the bill be an indorſed bill, and the indorſee cannot get the drawee to diſcharge it, he may call upon either the drawer or the indorſor, or if the bill has been negotiated

(x) Lord Raym. 993. (y) Salk. 127.

through many hands, upon any of the indorſors; for each indorſor is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorſor, as of the drawer. And if ſuch indorſor, ſo called upon, has the names of one or more indorſors prior to his own, to each of whom he is properly an indorſee, he is alſo at liberty to call upon any of them to make him ſatisfaction; and ſo upwards. But the firſt indorſor has nobody to reſort to, but the drawer only.

WHAT has been ſaid of bills of exchange is applicable alſo to promiſſory notes, that are indorſed over, and negotiated from one hand to another: only that, in this caſe, as there is no drawee, there can be no proteſt for non-acceptance; or rather, the law conſiders a promiſſory note in the light of a bill drawn by a man upon himſelf, and accepted at the time of drawing. And, in caſe of non-payment by the drawer, the ſeveral indorſees of a promiſſory note have the ſame remedy, as upon bills of exchange, againſt the prior indorſors.

CHAPTER THE THIRTY FIRST.

OF TITLE BY BANKRUPTCY.

THE preceding chapter having treated pretty largely of the acquiſition of perſonal property by ſeveral commercial methods, we from thence ſhall be eaſily led to take into our preſent conſideration a tenth method of transferring property, which is that of

X. BANKRUPTCY; a title which we before lightly touched upon (a), ſo far as it related to the transfer of the real eſtate of the bankrupt. At preſent we are to treat of it more minutely, as it principally relates to the diſpoſition of chattels, in which the property of perſons concerned in trade more uſually conſiſts, than in lands or tenements. Let us therefore firſt of all conſider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commiſſion of bankrupt: and, 4. In what manner an eſtate in goods and chattels may be *transferred* by bankruptcy.

1. WHO may become a bankrupt. A bankrupt was before (b) defined to be "a trader, who ſecretes himſelf, or "does certain other acts, tending to defraud his creditors." He was formerly conſidered merely in the light of a criminal or offender (c); and in this ſpirit we are told by ſir Edward Coke (d), that we have taken as well the name, as the

(a) See page 285.
(b) *Ibid.*
(c) Stat. 1. Jac. I. c. 15. § 17.
(d) 4 Inſt. 277.

wickedneſs, of bankrupts from foreign nations (e). But at preſent the laws of bankruptcy are conſidered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as juſtice; and to that end they confer ſome privileges, not only on the creditors. but alſo on the bankrupt or debtor himſelf. On the creditors; by compelling the bankrupt to give up all his effects to their uſe, without any fraudulent concealment: on the debtor; by exempting him from the rigour of the general law, whereby his perſon might be confined at the diſcretion of his creditor, though in reality he has nothing to ſatisfy the debt; whereas the law of bankrupts, taking into conſideration the ſudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their perſons, and ſome pecuniary emoluments, upon condition they ſurrender up their whole eſtate to be divided among their creditors.

IN this reſpect our legiſlature ſeems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable ſhare: if indeed that law, *de debitore in partes ſecando*, is to be underſtood in ſo very butcherly a light; which many learned men have with reaſon doubted (f). Nor do I mean thoſe leſs inhuman laws (if they may be called ſo, as *their* meaning is indiſputably certain) of impriſoning the debtor's perſon in chains; ſubjecting him to ſtripes and hard labour, at the mercy of his rigid creditor; and ſometimes ſelling him, his wife, and children, to perpetual foreign ſlavery *trans Tiberim* (g): an oppreſſion, which produced ſo many

(e) The word itſelf is derived from the word *bancus* or *banque*, which ſignifies the table or counter of a tradeſman (Dufreſne. I. 969.) and *ruptus*, broken; denoting thereby one whoſe ſhop or place of trade is broken and gone; though others rather chuſe to adopt the word *route*, which in French ſignifies a trace or track, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inſt. 277) And it is obſervable that the title of the firſt Engliſh ſtatute concerning this offence, 34 Hen. VIII. c. 4. "againſt ſuch perſons as do make bankrupt," is a literal tranſlation of the French idiom, *qui font banque route*.

(f) Taylor. *Comment. in L. decemviral.* Bynkerſh. *Obſerv. Jur. I.* 1. Heinecc. *Antiqu. III.* 30. 4.

(g) In Pegu, and the adjacent countries in Eaſt India, the creditor is entitled to diſpoſe of the debtor himſelf, and likewiſe of his wife and children;

many popular insurrections, and secessions to the *mons sacer*. But I mean the law of *cession*, introduced by the christian emperors; whereby if a debtor ceded, or yielded up, all his fortune to his creditors, he was secured from being dragged to a gaol, "*omni quoque corporali cruciatu semoto* (h)." For, as the emperor justly observes (i), "*inhumanum erat spoliari "tum fortunis suis in solidum damnari.*" Thus far was just and reasonable: but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted (k), that if the debtor by any unforeseen accident was reduced to low circumstances, and would *swear* that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

THE laws of England, more wisely, have steered in the middle between both extremes: providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the laws hold it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or one in a liberal

dren; insomuch that he may even violate with impunity the chastity of the debtor's wife: but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

(h) *Cod.* 7. 71. *per tot.*

(i) *Inst.* 4. 6. 40.

(k) *Nov.* 135. *c.* 1.

pro-

profeſſion, at the time of contracting his debts, has a ſufficient fund to pay them, the delay of payment is a ſpecies of diſhoneſty, and a temporary injuſtice to his creditor: and if, at ſuch time, he has no ſufficient fund, the diſhoneſty and injuſtice is the greater. He cannot therefore murmur, if he ſuffers the puniſhment which he has voluntarily drawn upon himſelf. But in mercantile tranſactions the caſe is far otherwiſe. Trade cannot be carried on without mutual credit on both ſides: the contracting of debts is therefore here not only juſtifiable, but neceſſary. And if by accidental calamities, as by the loſs of a ſhip in a tempeſt, the failure of brother traders, or by the non-payment of perſons out of trade, a merchant or trader becomes incapable of diſcharging his own debts, it is his misfortune and not his fault. To the misfortunes therefore of debtors the law has given a compaſſionate remedy, but denied it to their faults: ſince, at the ſame time that it provides for the ſecurity of commerce, by enacting that every conſiderable trader may be declared a bankrupt, for the benefit of his creditors as well as himſelf, it has alſo to diſcourage extravagance declared, that no one ſhall be capable of being made a bankrupt, but only a *trader*; nor capable of receiving the full benefit of the ſtatutes, but only an *induſtrious* trader.

THE firſt ſtatute made concerning any Engliſh bankrupts, was 34 Hen. VIII. c. 4. when trade began firſt to be properly cultivated in England: which has been almoſt totally altered by ſtatute 13 Eliz. c. 7. whereby bankruptcy is confined to ſuch perſons only as have *uſed the trade of merchandize*, in groſs or by retail, by way of bargaining, exchange, rechange, bartering, cheviſance (l), or otherwiſe; or have *ſought their living by buying and ſelling*. And by ſtatute 21 Jac. I. c. 19. perſons uſing the trade or profeſſion of a *ſcrivener*, receiving other mens monies and eſtates into their truſt and cuſtody, are alſo made liable to the ſtatutes of bankruptcy: and the benefits, as well as the penal parts of the law, are extended as well to *aliens* and *denizens* as to natural born

(l) that is, making contracts. (Dufreſne. II. 569.

ſubjects;

ſubjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives. By many ſubſequent ſtatutes, but laſtly by ſtatute 5 Geo. II. c. 30. (m), *bankers*, *brokers*, and *factors*, are declared liable to the ſtatutes of bankruptcy; and this upon the ſame reaſon that ſcriveners are included by the ſtatute of James I. *viz.* for the relief of their creditors; whom they have otherwiſe more opportunities of defrauding than any other ſet of dealers: and they are properly to be looked upon as traders, ſince they make merchandize of money, in the ſame manner as other merchants do of goods and other moveable chattels. But by the ſame act (n), no *farmer*, *grazier*, or *drover*, ſhall, (as ſuch) be liable to be deemed a bankrupt: for, though they buy and ſell corn, and hay, and beaſts, in the courſe of huſbandry, yet trade is not their principal, but only a collateral, object, their chief concern being to manure and till the ground, and make the beſt advantage of its produce. And, beſides, the ſubjecting them to the laws of bankruptcy might be a means of defeating their landlords of the ſecurity which the law has given them above all others, for the payment of their reſerved rents: wherefore alſo, upon a ſimilar reaſon, a *receiver of the King's taxes* is not capable (o), as ſuch, of being a bankrupt; leſt the king ſhould be defeated of thoſe extenſive remedies againſt his debtors, which are put into his hands by the prerogative. By the ſame ſtatute (p), no perſon ſhall have a commiſſion of bankrupt awarded againſt him, unleſs at the petition of ſome *one* creditor, to whom he owes 100*l*; or of *two*, to whom he is indebted 150*l*; or of *more*, to whom all together he is indebted 200*l*. For the law does not look upon perſons, whoſe debts amount to leſs, to be traders conſiderable enough, either to enjoy the benefit of the ſtatutes, themſelves, or to entitle the creditors, for the benefit of public commerce, to demand the diſtribution of their effects.

(m) § 39.
(n) § 40.
(o) § *eod.*
(p) § 23.

IN

IN the interpretation of theſe ſeveral ſtatutes, it hath been held, that buying only, or ſelling only, will not qualify a man to be a bankrupt; but it muſt be both buying and ſelling, and alſo getting a livelihood by it. As, by exerciſing the calling of a merchant, a grocer, a mercer, or, in one general word, a *chapman*, who is one that buys and ſells any thing. But no handicraft occupation (where nothing is bought and ſold, and therefore an extenſive credit, for the ſtock in trade, is not neceſſary to be had) will make a man a regular bankrupt; as that of a huſbandman, a gardener, and the like, who are paid for their work and labour (q). Alſo an inn-keeper cannot, as ſuch, be a bankrupt (r): for his gain or livelihood does not ariſe from buying and ſelling in the way of merchandize, but greatly from the uſe of his rooms and furniture, his attendance, and the like: and though he may buy corn and victuals, to ſell again at a profit, yet that no more makes him a trader, than a ſchoolmaſter or other perſon is, that keeps a boarding houſe, and makes conſiderable gains by buying and ſelling what he ſpends in the houſe, and ſuch a one is clearly not within the ſtatutes (s). But where perſons buy goods, and make them up into ſaleable commodities, as ſhoemakers, ſmiths, and the like; here, though part of the gain is by bodily labour, and not by buying and ſelling, yet they are within the ſtatutes of bankrupts (t); for the labour is only in melioration of the commodity, and rendering it more fit for ſale.

ONE ſingle act of buying and ſelling will not make a man a trader; but a repeated practice, and profit by it. Buying and ſelling bank-ſtock, or other government ſecurities, will not make a man a bankrupt; they not being goods, wares, or merchandize, within the intent of the ſtatute, by which a profit may be fairly made (u). Neither will buying and ſelling under particular reſtraints, or for particular purpoſes;

(q) Cro. Car. 31.
(r) Cro. Car. 549. Skinn. 291.
(s) Skinn. 292. 3 Mod. 330.
(t) Cro. Car. 31. Skinn. 292.
(u) 2 P. Wms. 308.

as

as if a commiſſioner of the navy uſes to buy victuals for the fleet, and diſpoſe of the ſurplus and refuſe, he is not thereby made a trader within the ſtatutes (w). An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for neceſſaries; and the ſtatutes of bankruptcy create no new debts, but only give a ſpeedier and more effectual remedy for recovering ſuch as were before due: and no perſon can be made a bankrupt for debts, which he is not liable at law to pay (x). But a feme-covert in London, being a ſole trader according to the cuſtom, is liable to a commiſſion of bankrupt (y).

2. HAVING thus conſidered, who may, and who may not, be made a bankrupt, we are to enquire, ſecondly, by what *acts* a man may become a bankrupt. A bankrupt is, "a trader who ſecretes himſelf, or does certain other acts, "tending to defraud his creditors." We have hitherto "been employed in explaining the former part of this deſcription, "a trader:" let us now attend to the latter, "who ſecretes himſelf, or does certain other acts, tending "to defraud his creditors." And, in general, whenever ſuch a trader, as is before deſcribed, hath endeavoured to avoid his creditors or evade their juſt demands, this hath been declared by the legiſlature to be an act of bankruptcy, upon which a commiſſion may be ſued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whoſe circumſtances are declining, in the firſt inſtance, or at leaſt as early as poſſible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly waſting his ſubſtance, and then claim the benefit of the ſtatutes, when he has nothing left to diſtribute.

To learn what the particular acts of bankruptcy are which render a man a bankrupt, we muſt conſult the ſeveral ſtatutes, and the reſolutions formed by the courts thereon. Among

(w) 1 Salk. 110. Skin. 292.
(x) Lord Raym. 443.
(y) *La Vie* v. *Philips*. M. 6 Geo. III. B. R.

theſe

theſe may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himſelf from the juriſdiction and coërcion of the law, with intent to defraud his creditors (z). 2. Departing from his own houſe, with intent to ſecrete himſelf, and avoid his creditors (a). 3. Keeping in his own houſe, privately, ſo as not to be ſeen or ſpoken with by his creditors, except for juſt and neceſſary cauſe; which is likewiſe conſtrued to be an intention to defraud his creditors, by avoiding the proceſs of the law (b). 4. Procuring or ſuffering himſelf willingly to be arreſted, or outlawed, or impriſoned, without juſt and lawful cauſe; which is likewiſe deemed an attempt to defraud his creditors (c). 5. Procuring his money, goods, chattels, and effects to be attached or ſequeſtered by any legal proceſs; which is another plain and direct endeavour to diſappoint his creditors of their ſecurity (d). 6. Making any fraudulent conveyance to a friend, or ſecret truſtee, of his lands, tenements, goods, or chattels; which is an act of the ſame ſuſpicious nature with the laſt (e). 7. Procuring any protection, not being himſelf privileged by parliament, in order to ſcreen his perſon from arreſts; which alſo is an endeavour to elude the juſtice of the law (f). 8. Endeavouring or deſiring, by any petition to the king, or bill exhibited in any of the king's courts againſt any creditors, to compel them to take leſs than their juſt debts; or to procraſtinate the time of payment, originally contracted for; which are an acknowledgment of either his poverty or his knavery (g). 9. Lying in priſon for two months, or more, upon arreſt or other detention for debt, without finding bail, in order to obtain his liberty (h). For the inability to procure bail argues a ſtrong deficiency in his credit, owing either to his ſuſpected poverty, or ill character; and his neglect to do it, if able, can ariſe only from a fraudulent intention: in either of which caſes it is high time for his creditors to look

(z) Stat. 13. Eliz. c. 7.
(a) *Ibid.* 1 Jac. I. c. 15.
(b) Stat. 13 Eliz. c. 7.
(c) *Ibid.* 1 Jac. I. c. 15.
(d) Stat. 1 Jac. I. c. 15.
(e) *Ibid.*
(f) Stat. 21 Jac. I. c. 19.
(g) *Ibid.*
(h) *Ibid.*

to

to themſelves, and compel a diſtribution of his effects. 10. Eſcaping from priſon after an arreſt for a juſt debt of 100*l.* or upwards (i). For no man would break priſon, that was able and deſirous to procure bail; which brings it within the reaſon of the laſt caſe. 11. Neglecting to make ſatisfaction for any juſt debt to the amount of 100*l.* within two months after ſervice of legal proceſs, for ſuch debt, upon any trader having privilege of parliament (k).

THESE are the ſeveral acts of bankruptcy, expreſsly defined by the ſtatutes relating to this title: which being ſo numerous, and the whole law of bankrupts being an innovation on the common law, our courts of juſtice have been tender of extending or multiplying acts of bankruptcy by any conſtruction, or implication. And therefore ſir John Holt held (l), that a man's removing his goods privately, to prevent their being ſeiſed in execution, was no act of bankruptcy. For the ſtatutes mention only fraudulent gifts to third perſons, and procuring them to be ſeiſed by ſham proceſs, in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of thoſe caſes, cannot be adjudged an act of bankruptcy. So alſo it has been determined expreſsly, that a banker's ſtopping or refuſing payment is no act of bankruptcy; for it is not within the deſcription of any of the ſtatutes, and there may be good reaſons for his ſo doing, as, ſuſpicion of forgery, and the like: and if, in conſequence of ſuch refuſal, he is arreſted, and puts in bail, ſtill it is no act of bankruptcy (m): but if he goes to priſon, and lies there two months, then, and not before, he is become a bankrupt.

WE have ſeen *who* may be a bankrupt, and what *acts* will make him ſo: let us next conſider,

3. THE *proceedings* on a commiſſion of bankrupt: ſo far as they affect the bankrupt himſelf. And theſe depend entirely

(i) Stat. 21. Jac. I. c. 19.
(k) Stat. 4 Geo. III. c 33.
(l) Lord Raym. 725.
(m) 7 Mod. 139.

tirely on the ſeveral ſtatutes of bankruptcy (n); all which I ſhall endeavour to blend together, and digeſt into a conciſe methodical order.

And, firſt, there muſt be a *petition* to the lord chancellor by one creditor to the amount of 100*l*, or by two to the amount of 150*l*, or by three or more to the amount of 200*l*. upon which he grants a *commiſſion* to ſuch diſcreet perſons as to him ſhall ſeem good, who are then ſtiled commiſſioners of bankrupt. The petitioners, to prevent malicious applications, muſt be bound in a ſecurity of 200*l*, to make the party amends in caſe they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt, as a recompence for ſuing out the commiſſion, ſo as to receive more than their ratable dividends of the bankrupt's eſtate, they forfeit not only what they ſhall have ſo received, but their whole debt. Theſe proviſions are made, as well to ſecure perſons in good credit from being damnified by malicious petitions, as to prevent knaviſh combinations between the creditors and bankrupt, in order to obtain the benefit of a commiſſion. When the commiſſion is awarded and iſſued, the commiſſioners are to meet, at their own expence, and to take an oath for the due execution of their commiſſion, and to be allowed a ſum not exceeding 20*s*. *per diem* each, at every ſitting. And no commiſſion of bankrupt ſhall abate, or be void, upon any demiſe of the crown.

When the commiſſioners have received their commiſſion, they are firſt to receive proof of the perſon's being a trader, and having committed ſome act of bankruptcy; and then to declare him a bankrupt, if proved ſo; and to give notice thereof in the gazette, and at the ſame time to appoint three meetings. At one of theſe meetings an election muſt be made of aſſignees, or perſons to whom the bankrupt's eſtate ſhall be aſſigned, and in whom it ſhall be veſted for the benefit of the creditors; which aſſignees are to be choſen by

(n) 13 Eliz. c. 7. 1 Jac. I. c. 15. 21 Jac. I. c. 19. 7 Geo. I. c. 31. 5 Geo. II. c. 30. 19 Geo. II. c. 32. & 24 Geo. II. c. 57.

the

the major part, in value, of the creditors who ſhall then have proved their debts: but may be originally appointed by the commiſſioners, and afterwards approved or rejected by the creditors: but no creditor ſhall be admitted to vote in the choice of aſſignees, whoſe debt on the ballance of accounts does not amount to 10*l.* And at the third meeting, at fartheſt, which muſt be on the forty ſecond day after the advertiſement in the gazette, the bankrupt, upon notice alſo perſonally ſerved upon him, or left at his uſual place of abode, muſt ſurrender himſelf perſonally to the commiſſioners, and muſt thenceforth in all reſpects conform to the directions of the ſtatutes of bankruptcy; or, in default thereof, ſhall be guilty of felony without benefit of clergy, and ſhall ſuffer death, and his goods and eſtate ſhall be diſtributed among his creditors.

IN caſe the bankrupt abſconds, or is likely to run away, between the time of the commiſſion iſſued, and the laſt day of ſurrender, he may by warrant from any judge or juſtice of the peace be committed to the county goal, in order to be forthcoming to the commiſſioners; who are alſo empowered immediately to grant a warrant for ſeiſing his goods and papers.

WHEN the bankrupt appears, the commiſſioners are to examine him touching all matters relating to his trade and effects. They may alſo ſummon before them, and examine, the bankrupt's wife and any other perſon whatſoever, as to all matters relating to the bankrupt's affairs. And in caſe any of them ſhall refuſe to anſwer, or ſhall not anſwer fully, to any lawful queſtion, or ſhall refuſe to ſubſcribe ſuch their examination, the commiſſioners may commit them to priſon without bail, till they make and ſign a full anſwer; the commiſſioners ſpecifying in their warrant of commitment the queſtion ſo refuſed to be anſwered. And any goaler, permitting ſuch perſons to eſcape, or go out of priſon, ſhall forfeit 500*l.* to the creditors.

THE bankrupt, upon this examination, is bound upon pain of death to make a full diſcovery of all his eſtate and effects, as well in expectancy as poſſeſſion, and how he has diſpoſed of the ſame; together with all books and writings relating thereto: and is to deliver up all in his own power to the commiſſioners; (except the neceſſary apparel of himſelf, his wife, and his children) or, in caſe he conceals or imbezzles any effects to the amount of 20 *l*, or withholds any books or writings, with intent to defraud his creditors, he ſhall be guilty of felony without benefit of clergy (o).

AFTER the time allowed to the bankrupt for ſuch diſcovery is expired, any other perſon voluntarily diſcovering any part of his eſtate before unknown to the aſſignees, ſhall be entitled to *five per cent.* out of the effects ſo diſcovered, and ſuch farther reward as the aſſignees and commiſſioners ſhall think proper. And any truſtee wilfully concealing the eſtate of any bankrupt, after the expiration of the two and forty days, ſhall forfeit 100 *l*, and double the value of the eſtate concealed, to the creditors.

HITHERTO every thing is in favour of the creditors; and the law ſeems to be pretty rigid and ſevere againſt the bankrupt: but, in caſe he proves honeſt, it makes him full amends for all this rigor and ſeverity. For if the bankrupt hath made an ingenuous diſcovery, hath conformed to the directions of the law, and hath acted in all points to the ſatisfaction of his creditors; and if they, or four parts in five of them in number and value, (but none of them creditors for leſs than 20 *l*.) will ſign a certificate to that purport; the commiſſioners are then to authenticate ſuch certificate under their hands and ſeals, and to tranſmit it to the lord chancellor: and he, or two judges whom he ſhall appoint, on oath

(o) By the laws of Naples all fraudulent bankrupts, particularly ſuch as do not ſurrender themſelves within four days, are puniſhed with death: alſo all who conceal the effects of a bankrupt, or ſet up a pretended debt to defraud his creditors. (Mod. Un. Hiſt. xxviii. 320).

made

made by the bankrupt that ſuch certificate was obtained without fraud, may allow the ſame; or diſallow it, upon cauſe ſhewn by any of the creditors of the bankrupt.

IF no cauſe be ſhewn to the contrary, the certificate is allowed of courſe; and then the bankrupt is entitled to a decent and reaſonable allowance out of his effects, for his future ſupport and maintenance, and to put him in a way of honeſt induſtry. This allowance is alſo in proportion to his former good behaviour, in the early diſcovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one half of his debts, or ten ſhillings in the pound, he is left to the diſcretion of the commiſſioners and aſſignees, to have a competent ſum allowed him, not exceeding *three per cent:* but if they pay ten ſhillings in the pound, he is to be allowed *five per cent*; if twelve ſhillings and ſixpence, then *ſeven and a half per cent*; and if fifteen ſhillings in the pound, then the bankrupt ſhall be allowed *ten per cent:* provided, that ſuch allowance do not in the firſt caſe exceed 200 *l*, in the ſecond 250 *l*, and in the third 300 *l*. (p).

BESIDES this allowance, he has alſo an indemnity granted him, of being free and diſcharged for ever from all debts owing by him at the time he became a bankrupt; even though judgment ſhall have been obtained againſt him, and he lies in priſon upon execution for ſuch debts; and, for that among other purpoſes, all proceedings on commiſſion of bankrupt are, on petition, to be entered of record, as a perpetual bar againſt actions to be commenced on this account: though, in general, the production of the certificate properly allowed, ſhall be ſufficient evidence of all previous procee-

(p) By the Roman law of ceſſion, if the debtor acquired any conſiderable property ſubſequent to the giving up of his all, it was liable to the demands of his creditors. (*Ff.* 42. 3 4.) But this did not extend to ſuch allowance as was left to him on the ſcore of compaſſion, for the maintenance of himſelf and family. *Si quid miſericordiæ cauſa ei fuerit relictum, puta menſtruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterat venundari: nec enim fraudandus eſt alimentis cottidianis.* (*Ibid. l.* 6.)

dings. Thus the bankrupt becomes a clear man again; and by the aſſiſtance of his allowance and his own induſtry, may become a uſeful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to theſe benefits, but by the teſtimony of his creditors themſelves of his honeſt and ingenuous diſpoſition; and unleſs his failures have been owing to misfortunes, rather than to miſconduct and extravagance.

FOR no allowance or indemnity ſhall be given to a bankrupt, unleſs his certificate be ſigned and allowed, as beforementioned; and alſo, if any creditor produces a fictitious debt, and the bankrupt does not make diſcovery of it, but ſuffers the fair creditor to be impoſed upon, he loſes all title to theſe advantages. Neither can he claim them, if he has given with any of his children above 100*l.* for a marriage portion, unleſs he had at that time ſufficient left to pay all his debts; or if he has loſt at any one time 5*l.* or in the whole 100*l.* within a twelvemonth before he became a bankrupt, by any manner of gaming or wagering whatſoever; or, within the ſame time, has loſt to the value of 100*l.* by ſtock-jobbing. Alſo, to prevent the too common practice of frequent and fraudulent or careleſs breaking, a mark is ſet upon ſuch as have been once cleared by a commiſſion of bankrupt, or have compounded with their creditors, or have been delivered by an act of inſolvency: which is an occaſional act, frequently paſſed (q) by the legiſlature; whereby all perſons whatſoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile ſtate of life are not included within the laws of bankruptcy, are diſcharged from all ſuits and impriſonment, upon delivering up all their eſtate and effects to their creditors upon oath, at the ſeſſions or aſſiſes; in which caſe their perjury or fraud is uſually, as in caſe of bankrupts, puniſhed with death. Perſons who have been once cleared by this, or either of the other methods, (of compoſition with their creditors, or bankruptcy) and after-

(q) Stat. 28 Geo. II. c. 13. 33 Geo. II. c. 28. 1 Geo. III. c. 17. 5 Geo. III. c. 41.

wards

wards become bankrupts again, unleſs they pay full fifteen ſhillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future eſtate they ſhall acquire remains liable to their creditors, excepting their neceſſary apparel, houſehold goods, and the tools and implements of their trades.

THUS much for the proceedings on a commiſſion of bankrupt, ſo far as they affect the bankrupt himſelf perſonally. Let us next conſider,

4. How ſuch proceedings affect or transfer the *eſtate* and *property* of the bankrupt. The method whereby a *real* eſtate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was ſhewn under its proper head, in a former chapter (r). At preſent therefore we are only to conſider the transfer of things *perſonal* by this operation of law.

BY virtue of the ſtatutes before-mentioned all the perſonal eſtate and effects of the bankrupt are conſidered as veſted, by the act of bankruptcy, in the future aſſignees of his commiſſioners, whether they be goods in actual *poſſeſſion*, or debts, contracts, and other choſes in *action*; and the commiſſioners by their warrant may cauſe any houſe or tenement of the bankrupt to be broken open, in order to enter upon and ſeiſe the ſame. And, when the aſſignees are choſen or approved by the creditors, the commiſſioners are to aſſign every thing over to them; and the property of every part of the eſtate is thereby as fully veſted in them, as it was in the bankrupt himſelf, and they have the ſame remedies to recover it (s).

THE property veſted in the aſſignees is the whole that the bankrupt had in himſelf, at the time he committed the firſt act of bankruptcy, or that has been veſted in him ſince, before his debts are ſatisfied or agreed for. Therefore it is uſually ſaid, that once a bankrupt, and always a bankrupt: by which is meant, that a plain direct act of bankruptcy once

(r) Pag. 285. (s) 12 Mod. 324.

committed cannot be purged, or explained away, by any ſubſequent conduct, as a dubious equivocal act may be (t); but that, if a commiſſion is afterwards awarded, the commiſſion and the property of the aſſignees ſhall have a relation, or reference, back to the firſt and original act of bankruptcy (u). Inſomuch that all tranſactions of the bankrupt are from that time abſolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from ſuch as are privy to his bankruptcy; for they are no longer his property, or his debts, but thoſe of the future aſſignees. And, if an execution be ſued out, but not ſerved and executed on the bankrupt's effects till after the act of bankruptcy, it is void as againſt the aſſignees. But the king is not bound by this fictitious relation, nor is within the ſtatutes of bankrupts (w); for if, after the act of bankruptcy committed, and before the aſſignment of his effects, an extent iſſues for the debt of the crown, the goods are bound thereby (x). In France this doctrine of relation is carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, is preſumed to be fraudulent, and is therefore void (y). But with us the law ſtands upon a more reaſonable footing: for, as theſe acts of bankruptcy may ſometimes be ſecret to all but a few, and it would be prejudicial to trade to carry this notion to its utmoſt length, it is provided by ſtatute 19 Geo. II. c. 32. that no money paid by a bankrupt to a *bona fide* or real creditor, in a courſe of trade, even after an act of bankruptcy done, ſhall be liable to be refunded. Nor, by ſtatute 1 Jac. I. c. 15. ſhall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent tranſactions, and not to diſtreſs the fair trader.

THE aſſignees may purſue any *legal* method of recovering this property ſo veſted in them, by their own authority; but

(t) Salk. 110.
(u) 4 Burr. 32.
(w) Atk. 262.
(x) Viner. Abr. t. creditor and bankr. 104.
(y) Sp. L. b. 29. c. 16.

cannot

cannot commence a ſuit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the conſent of the creditors, or the major part of them in value, at a meeting to be held in purſuance of notice in the gazette.

WHEN they have got in all the effects they can reaſonably hope for, and reduced them to ready money, the aſſignees muſt, within twelve months after the commiſſion iſſued, give one and twenty days notice to the creditors of a meeting for a dividend or diſtribution; at which time they muſt produce their accounts, and verify them upon oath, if required. And then the commiſſioners ſhall direct a dividend to be made, at ſo much in the pound, to all creditors who have before proved, or ſhall then prove, their debts. This dividend muſt be made equally, and in a ratable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages indeed, for which the creditor has a real ſecurity in his own hands, are entirely ſafe; for the commiſſion of bankrupt reaches only the equity of redemption (z). So are alſo perſonal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the ſtatute 8 Ann. c. 14. (which directs, that, upon all executions of goods being on any premiſes demiſed to a tenant, one year's rent and no more ſhall, if due, be paid to the landlord) it hath alſo been held, that under a commiſſion of bankrupt, which is in the nature of a ſtatute-execution, the landlord ſhall be allowed his arrears of rent to the ſame amount, in preference to other creditors, even though he hath neglected to diſtrein, while the goods remained on the premiſes; which he is otherwiſe intitled to do for his intire rent, be the *quantum* what it may (a). But, otherwiſe, judgments and recognizances, (both which are debts of record, and therefore at other times have a priority) and alſo bonds and obligations by deed or ſpecial inſtrument (which are called debts by ſpecialty, and

(z) Finch. Rep. 466.

(a) Atk. 103, 104.

are uſually the next in order) theſe are all put on a level with debts by mere ſimple contract, and all paid *pari paſſu*. Nay, ſo far is this matter carried, that, by the expreſs proviſion of the ſtatutes, debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day, ſhall be paid equally with the reſt (b), allowing a diſcount or drawback in proportion. And inſurances, and obligations upon bottomry or *reſpondentia*, *bona fide* made by the bankrupt, though forfeited after the commiſſion is awarded, ſhall be looked upon in the ſame light as debts contracted before any act of bankruptcy.

WITHIN eighteen months after the commiſſion iſſued, a ſecond and final dividend ſhall be made, unleſs all the effects were exhauſted by the firſt. And if any ſurplus remains, after paying every creditor his full debt, it ſhall be reſtored to the bankrupt. This is a caſe which ſometimes happens to men in trade, who involuntarily, or at leaſt unwarily, commit acts of bankruptcy, by abſconding and the like, while their effects are more than ſufficient to pay their creditors. And, if any ſuſpicious or malevolent creditor will take the advantage of ſuch acts, and ſue out a commiſſion, the bankrupt has no remedy, but muſt quietly ſubmit to the effects of his own imprudence; except that, upon ſatisfaction made to all the creditors, the commiſſion may be *ſuperſeded* (c). This caſe may alſo happen, when a knave is deſirous of defrauding his creditors, and is compelled by a commiſſion to do them that juſtice, which otherwiſe he wanted to evade. And therefore, though the uſual rule is, that all intereſt on debts carrying intereſt ſhall ceaſe from the time of iſſuing the commiſſion, yet, in caſe of a ſurplus left after payment of every debt, ſuch intereſt ſhall again revive, and be chargeable on the bankrupt (d), or his repreſentatives.

(b) Lord Raym. 1549.
(c) 2 Ch. Cal. 144.
(d) Atk. 244.

CHAPTER

CHAPTER THE THIRTY SECOND.

OF TITLE BY TESTAMENT, AND ADMINISTRATION.

THERE yet remain to be examined, in the preſent chapter, two other methods of acquiring perſonal eſtates, *viz.* by *teſtament* and *adminiſtration*. And theſe I propoſe to conſider in one and the ſame view; they being in their nature ſo connected and blended together, as makes it impoſſible to treat of them diſtinctly, without manifeſt tautology and repetition.

XI. XII. IN the purſuit then of this joint ſubject, I ſhall, firſt, enquire into the original and antiquity of teſtaments and adminiſtrations; ſhall, ſecondly, ſhew who is capable of making a laſt will and teſtament; ſhall, thirdly, conſider the nature of a teſtament and its incidents; ſhall, fourthly, ſhew what an executor and adminiſtrator are, and how they are to be appointed; and, laſtly, ſhall ſelect ſome few of the general heads of the office and duty of executors and adminiſtrators.

FIRST, as to the *original* of teſtaments and adminiſtrations. We have more than once obſerved, that, when property came to be veſted in individuals by the right of occupancy, it became neceſſary for the peace of ſociety, that this occupancy ſhould be continued, not only in the preſent poſſeſſor, but in thoſe perſons to whom he ſhould think proper to transfer it; which introduced the doctrine and practice of alienations,

alienations, gifts, and contracts. But theſe precautions would be very ſhort and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of ſtrife and confuſion. The law of very many ſocieties has therefore given to the proprietor a right of continuing his property after his death, in ſuch perſons as he ſhall name; and, in defect of ſuch appointment or nomination, the law of every ſociety has directed the goods to be veſted in certain particular individuals, excluſive of all other perſons (a). The former method of acquiring perſonal property, according to the expreſs directions of the deceaſed, we call a *teſtament:* the latter, which is alſo according to the will of the deceaſed, not expreſſed indeed but preſumed by the law (b), we call in England an *adminiſtration*; being the ſame which the civil lawyers term a ſucceſſion *ab inteſtato*, and which anſwers to the deſcent or inheritance of real eſtates.

TESTAMENTS are of very high antiquity. We find them in uſe among the antient Hebrews; though I hardly think the example uſually given (c), of Abraham's complaining (d) that unleſs he had ſome children of his body, his ſteward Eliezer of Damaſcus would be his heir, is quite concluſive to ſhew that he had made him ſo by *will*. And indeed a learned writer (e) has adduced this very paſſage to prove, that in the patriarchal age, on failure of children or kindred, the ſervants born under their maſter's roof ſucceeded to the inheritance as heirs at law (f). But, (to omit what Euſebius and others have related of Noah's teſtament, made in *writing* and witneſſed under his *ſeal*, whereby he diſpoſed of the whole world) (g), I apprehend that a much more authentic inſtance of the early uſe of teſtaments may be found in the ſacred writings (h), wherein Jacob bequeaths to his ſon Jo-

(a) Puff. L. of N. b. 4. c. 10.
(b) *Ibid.* b. 4. c. 11.
(c) Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Leg. 1. 1.
(d) Gen. c. 15.
(e) Taylor's elem. civ. law. 517.
(f) See pag. 12.
(g) Selden. *de ſucc. Ebr. c.* 24.
(h) Gen. c. 48.

ſeph

ſeph a portion of his inheritance double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the poſterity of Joſeph were divided into two diſtinct tribes, thoſe of Ephraim and Manaſſeh, and had two ſeveral inheritances aſſigned them; whereas the deſcendants of each of the other patriarchs formed only one ſingle tribe, and had only one lot of inheritance. Solon was the firſt legiſlator that introduced wills into Athens (i); but in many other parts of Greece they were totally diſcountenanced (k). In Rome they were unknown, till the laws of the twelve tables were compiled, which firſt gave the right of bequeathing (l): and, among the northern nations, particularly among the Germans (m), teſtaments were not received into uſe. And this variety may ſerve to evince, that the right of making wills, and diſpoſing of property after death, is merely a creature of the civil ſtate (n); which has permitted it in ſome countries, and denied it to others; and, even where it is permitted by law, it is ſubjected in different formalities and reſtrictions in almoſt every nation under heaven (o).

WITH us in England this power of bequeathing is coeval with the firſt rudiments of the law: for we have no traces or memorials of any time when it did not exiſt. Mention is made of inteſtacy, in the old law before the conqueſt, as being merely accidental; and the diſtribution of the inteſtate's eſtate, after payment of the lord's heriot, is then directed to go according to the eſtabliſhed law. "*Sive quis* "*incuria, ſive morte repentina, fuerit inteſtatus mortuus, do-* "*minus tamen nullam rerum ſuarum partem (praeter eam quae* "*jure debetur hereoti nomine) ſibi aſſumito. Verum poſſeſſio-* "*nes uxori, liberis, et cognatione proximus, pro ſuo cuique* "*jure, diſtribuantur* (p). But we are not to imagine, that the power of bequeathing extended originally to *all* a man's perſonal eſtate. On the contrary, Glanvil will inform us (q),

(i) Plutarch. *in vita Solon.*
(k) Pott. Antiq. l. 4. c. 15.
(l) *Inſt.* 2. 22. 1.
(m) Tacit. *de mor Germ.* 21.
(n) See pag. 13.
(o) Sp. L. b. 27. c. 1. Vinnius *in Inſt. l.* 2. *tit.* 10.
(p) *LL. Canut. c.* 68.
(q) *l.* 2. *c.* 5.

that

that by the common law, as it ſtood in the reign of Henry the ſecond, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal deſcendants, another to his wife, and the third was at his own diſpoſal: or if he died without a wife, he might then diſpoſe of one moiety, and the other went to his children; and ſo *e converſo*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or iſſue, the whole was at his own diſpoſal (r). The ſhares of the wife and children were called their *reaſonable* parts; and the writ *de rationabili parte bonorum* was given to recover them (s).

THIS continued to be the law of the land at the time of *magna carta*, which provides, that the king's debts ſhall firſt of all be levied, and then the reſidue of the goods ſhall go to the executor to perform the will of the deceaſed: and, if nothing be owing to the crown, "*omnia catalla cedant de-*"*functo; ſalvis uxori ipſius et pueris ſuis rationabilibus parti-*"*bus ſuis.* (t)." In the reign of king Edward the third this right of the wife and children was ſtill held to be the univerſal or common law (u); though frequently pleaded as the local cuſtom of Berks, Devon, and other counties (w): and ſir Henry Finch lays it down expreſsly (x), in the reign of Charles the firſt, to be the general law of the land. But this law is at preſent altered by imperceptible degrees, and the deceaſed may now by will bequeath the whole of his goods and chattels: though we cannot trace out when firſt

(r) Bracton. *l.* 2. *c.* 26. Flet. *l.* 2. *c.* 57.

(s) F. N. B. 122.

(t) 9 Hen. III. c. 18.

(u) A widow brought an action of detinue againſt her huſband's executors, *quod cum per conſuetudinem totius regni Angliae hactenus uſitatam et approbatum, uxores debent et ſolent a tempore &c. habere ſuum rationabilem partem bonorum maritorum ſuorum: ita videlicet, quod ſi nullos habuerint liberos, tunc medietatem; et, ſi habuerint, tunc tertiam partem, &c.* and that her huſband died worth 200,000 marks, without iſſue had between them; and thereupon ſhe claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the huſband's dying without iſſue was denied; but the rule of law, as ſtated in the writ, ſeems to have been univerſally allowed. (*M.* 30 *Edw III.* 25.) And a ſimilar caſe occurs in *H.* 17 *Edw III.* 9.

(w) *Reg. Brev.* 142. Co. Litt. 176.

(x) Law 175.

this

this alteration began. Indeed ſir Edward Coke (y) is of opinion, that this never was the general law, but only obtained in particular places by ſpecial cuſtom: and to eſtabliſh that doctrine he relies on a paſſage in Bracton, which in truth, when compared with the context, makes directly againſt his opinion. For Bracton (z) lays down the doctrine of the *reaſonable part* to be the common law; but mentions that as a particular exception, which ſir Edward Coke has haſtily cited for the general rule. And Glanvil, *magna carta*, Fleta, the year-books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* was by the common law: which alſo continues to this day to be the general law of our ſiſter kingdom of Scotland (a). To which we may add, that, whatever may have been the cuſtom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the antient method continued in uſe in the province of York, the principality of Wales, and the city of London, till very modern times: when, in order to favour the power of bequeathing, and to reduce the whole kingdom to the ſame ſtandard, three ſtatutes have been provided; the one 4 & 5 W & M. c. 2. explained by 2 & 3 Ann. c. 5. for the province of York; another 7 & 8 W. III. c. 38. for Wales; and a third, 11 Geo. I. c. 18. for London: whereby it is enacted, that perſons within thoſe diſtricts, and liable to thoſe cuſtoms, may (if they think proper) diſpoſe of *all* their perſonal eſtates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly aboliſhed throughout all the kingdom of England, and a man may deviſe the whole of his chattels as freely, as he formerly could his third part or moiety. In diſpoſing of which he was bound by the cuſtom of many places (as was ſtated in a former chapter (b) to remember his lord and the church, by leaving them his two beſt chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty, to bequeath the remainder as he pleaſed.

(y) 2 Inſt. 33.
(z) *l.* 2. *c.* 26. § 2.
(a) Dalrymp. of feud. property. 145
(b) Pag. 426.

In

In caſe a perſon made no diſpoſition of ſuch of his goods as were teſtable, whether that were only part or the whole of them, he was, and is, ſaid to die inteſtate; and in ſuch caſes it is ſaid, that by the old law the king was entitled to ſeiſe upon his goods, as the *parens patriae*, and general truſtee of the kingdom (c). This prerogative the king continued to exerciſe for ſome time by his own miniſters of juſtice; and probably in the county court, where matters of all kinds were determined: and it was granted as a franchiſe to many lords of manors, and others, who have to this day a preſcriptive right to grant adminiſtration to their inteſtate tenants and ſuitors, in their own courts baron and other courts, or to have their wills there proved, in caſe they made any diſpoſition (d). Afterwards the crown, in favour of the church, inveſted the prelates with this branch of the prerogative; which was done, ſaith Perkins (e), becauſe it was intended by the law, that ſpiritual men are of better conſcience than laymen, and that they had more knowledge what things would conduce to the benefit of the ſoul of the deceaſed. The goods therefore of inteſtates were given to the ordinary by the crown; and he might ſeiſe them, and keep them without waſting, and alſo might give, alien, or ſell them at his will, and diſpoſe of the money *in pios uſus*: and, if he did otherwiſe, he broke the confidence which the law repoſed in him (f). So that properly the whole intereſt and power, which were granted to the ordinary, were only thoſe of being the king's almoner within his dioceſe; in truſt to diſtribute the inteſtate's goods in charity to the poor, or in ſuch ſuperſtitious uſes as the miſtaken zeal of the times had denominated pious (g). And, as he had thus the diſpoſition of inteſtates effects, the probate of wills of courſe followed: for it was thought juſt and natural, that the will of the deceaſed ſhould be proved to the ſatisfaction of the prelate, whoſe right of diſtributing his chattels for the good of his ſoul was effectually ſuperſeded thereby.

(c) 9 Rep. 38.
(d) *Ibid.* 37.
(e) § 486.
(f) Finch, Law. 173, 174.
(g) Plowd. 277.

The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct (h). But even in Fleta's time it was complained (i), "*quod ordinarii, hujusmodi bona nomine ecclesiae occupantes, nullam vel saltem indebitam faciunt distributionem.*" And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of pope Innocent IV (k), written about the year 1250; wherein he lays it down for established canon law, that "*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesiae et pauperum dispensanda est.*" Thus the popish clergy took to themselves (l) (under the name of the church and poor) the whole residue of the deceased's estate, after the *partes rationabiles*, or two thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2. (m) that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But, though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: and therefore the

(h) Plowd. 277.
(i) *l.* 2. *c.* 57. § 10.
(k) *in Decretal. l.* 5. *t.* 3. c. 42.
(l) The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bulle *A. D.* 1254. *Regist. honoris de Richm.* 101.) and was observed till abolished by the statute 26 Hen. VIII. c. 15.
(m) 13 Edw. I. c. 19.

statute

ſtatute 31 Edw. III. c. 11. provides, that, in caſe of inteſtacy, the ordinary ſhall depute the neareſt and moſt lawful friends of the deceaſed to adminiſter his goods; which adminiſtrators are put upon the ſame footing, with regard to ſuits and to accounting, as executors appointed by will. This is the original of adminiſtrators, as they at preſent ſtand; who are only the officers of the ordinary, appointed by him in purſuance of this ſtatute, which ſingles out the *next and moſt lawful friend* of the inteſtate; who is interpreted (n) to be the *next of blood* that is under no legal diſabilities. The ſtatute 21 Hen. VIII. c. 5. enlarges a little more the power of the eccleſiaſtical judge; and permits him to grant adminiſtration *either* to the widow, *or* the next of kin, *or* to both of them, at his own diſcretion; and, where two or more perſons are in the ſame degree of kindred, gives the ordinary his election to accept whichever he pleaſes.

Upon this footing ſtands the general law of adminiſtrations at this day. I ſhall, in the farther progreſs of this chapter, mention a few more particulars, with regard to who may, and who may not, be adminiſtrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only ſerving to ſhew the original and gradual progreſs of teſtaments and adminiſtrations: in what manner the latter was firſt of all veſted in the biſhops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular perſons nominated expreſsly by the law.

I proceed now, *ſecondly*, to enquire who may, or may not make a teſtament; or what perſons are abſolutely obliged by law to die inteſtate. And this law (o) is entirely prohibitory; for, regularly, every perſon hath full power and liberty to make a will, that is not under ſome ſpecial prohibition by our law or cuſtom: which prohibitions are principally upon

(n) 9 Rep. 39. (o) Godolph. Orph. Leg. *p.* 1. c. 7.

three

three accounts; for want of ſufficient diſcretion; for want of ſufficient liberty and free will; and on account of their criminal conduct.

1. IN the firſt ſpecies are to be reckoned infants under the age of fourteen if males, and twelve if females; which is the rule of the civil law (p). For, though ſome of our common lawyers have held that an infant of any age (even four years old) might make a teſtament (q), and others have denied that under eighteen he is capable (r), yet as the eccleſiaſtical court is the judge of every teſtator's capacity, this caſe muſt be governed by the rules of the eccleſiaſtical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but, if the teſtator was not of ſufficient diſcretion, whether at the age of fourteen or four and twenty, that will overthrow his teſtament. Madmen, or otherwiſe *non compotes*, idiots or natural fools, perſons grown childiſh by reaſon of old age or diſtemper, ſuch as have their ſenſes beſotted with drunkenneſs,—all theſe are incapable, by reaſon of mental diſability, to make any will ſo long as ſuch diſability laſts. To this claſs alſo may be referred ſuch perſons as are *born* deaf, blind, and dumb; who, as they want the common inlets of underſtanding, are incapable of having *animum teſtandi*, and their teſtaments are therefore void.

2. SUCH perſons, as are inteſtable for want of liberty or freedom of will, are by the civil law of various kinds; as priſoners, captives, and the like (s). But the law of England does not make ſuch perſons abſolutely inteſtable; but only leaves it to the diſcretion of the court to judge, upon the conſideration of the particular circumſtances of dureſs, whether or no ſuch perſons could be ſuppoſed to have *liberum animum teſtandi*. And, with regard to feme-coverts, our laws differ ſtill more materially from the civil. Among the Romans there was no diſtinction; a married woman was as capable of bequeathing as a feme-ſole (t). But with us a

(p) Godolph. p. 1. c. 8. Wentw. 212. 2 Vern. 104, 469. Gilb. Rep. 74.
(q) Perkins. § 503.
(r) Co. Litt. 89.
(s) Godolph. p. 1. c. 9.
(t) *Ff.* 31, 1, 77.

married woman is not only utterly incapable of deviſing *lands*, being excepted out of the ſtatute of wills, 34 & 35 Hen. VIII. c. 5. but alſo ſhe is incapable of making a teſtament of *chattels*, without the licence of her huſband. For all her perſonal chattels are abſolutely his own; and he may diſpoſe of her chattels real, or ſhall have them to himſelf if he ſurvives her: it would be therefore extremely inconſiſtent, to give her a power of defeating that proviſion of the law, by bequeathing thoſe chattels to another (v). Yet by her huſband's licence ſhe may make a teſtament (u); and the huſband, upon marriage, frequently covenants with her friends to allow her that licence: but ſuch licence is more properly, his aſſent; for, unleſs it be given to the particular will in queſtion, it will not be a complete teſtament, even though the huſband beforehand hath given her permiſſion to make a will (w). Yet it ſhall be ſufficient to repel the huſband from his general right of adminiſtring his wife's effects; and adminiſtration ſhall be granted to her appointee, with ſuch teſtamentary paper annexed (x). So that in reality the woman makes no will at all, but only ſomething like a will (y); operating in the nature of an appointment, the execution of which the huſband by his bond, agreement or covenant, is bound to allow. A diſtinction ſimilar to which, we meet with in the civil law. For, though a ſon who was *in poteſtate parentis* could not by any means make a formal and legal teſtament, even though his father permitted it (z), yet he might, with the like permiſſion of his father, make what was called a *donatio mortis cauſa* (a). The queen conſort is an exception to this general rule, for ſhe may diſpoſe of her chattels by will, without the conſent of her lord (b): and any femecovert may make her will of goods, which are in her poſſeſſion *in autre droit*, as executrix or adminiſtratrix; for theſe can never be the property of the huſband (c): and, if ſhe has any pinmoney or ſeparate maintenance, it is ſaid ſhe

(v) 4 Rep. 51.
(u) Dr. & St. d. 1. c. 7.
(w) Bro. *Abr. tit. deviſe.* 34. Stra. 891.
(x) *The king v dr. Betteſworth.* T. 13 Geo. II. B. R.
(y) Cro. Car. 376. 1 Mod. 211.
(z) *Ff.* 28. 1. 6.
(a) *Ff.* 39. 6. 25.
(b) Cro. Litt. 133.
(c) Godolph. 1. 10.

may

may diſpoſe of her ſavings thereout by teſtament, without the controul of her huſband (d). But, if a feme-ſole makes her will, and afterwards marries, ſuch ſubſequent marriage is eſteemed a revocation in law, and intirely vacates the will (e).

3 PERSONS incapable of making teſtament, on account of their criminal conduct, are in the firſt place all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own diſpoſal, but forfeited to the king. Neither can a *felo de ſe* make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a deviſe of his lands, for they are not ſubjected to any forfeiture (f). Outlaws alſo, though it be for debt, are incapable of making a will, ſo long as the outlawyry ſubſiſts, for their goods and chattels are forfeited during that time (g). As for perſons guilty of other crimes, ſhort of felony, who are by the civil law precluded from making teſtaments, (as uſurers, libellers, and others of a worſe ſtamp) at the common law their teſtaments may be good (h) And in general the rule is, and has been ſo at leaſt ever ſince Glanvil's time (j), *quod libera ſit cujuſcunque ultima voluntas.*

LET us next, *thirdly*, conſider what this laſt will and teſtament is, which almoſt every one is thus at liberty to make; or the nature and incidents of a teſtament. Teſtaments both Juſtinian (i) and ſir Edward Coke (k) agree to be ſo called, becauſe they are *teſtatio mentis*; an etymon, which ſeems to ſavour too much of the conceit; it being plainly a ſubſtantive derived from the verb *teſtari*, in like manner as *juramentum*, *incrementum*, and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis noſtrae juſta ſententia de eo, quod quis poſt mortem ſuam fieri velit* (l):" which may be thus rendered into Engliſh, "the legal declaration of a man's intentions,

(d) Prec. Chan. 44.
(e) 4 Rep. 60. 2 P. Wms. 624.
(f) Plowd. 261.
(g) Fitzh. *Abr. t. deſcent.* 16.
(h) Godolph. p. 1. c. 12.
(j) *l.* 7. *c.* 5.
(i) *Inſt.* 2. 10.
(k) 1 *Inſt.* 111. 322.
(l) *Ff.* 28. 1. 1.

"which he wills to be performed after his death." It is called *ſententia* to denote the circumſpection and prudence with which it is ſuppoſed to be made: it is *voluntatis noſtrae ſententia*, becauſe its efficacy depends on its declaring the teſtator's intention, whence in England it is emphatically ſtiled his *will*: it is *juſta ſententia*; that is, drawn, atteſted, and publiſhed with all due ſolemnities and forms of law: It is *de eo, quod quis poſt mortem ſuam fieri velit*, becauſe a teſtament is of no force till after the death of the teſtator.

THESE teſtaments are divided into two ſorts; *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the teſtator *in extremis* before a ſufficient number of witneſſes, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing, is a ſupplement to a will; or an addition made by the teſtator, and annexed to, and to be taken as part of, a teſtament: being for its explanation, or alteration, or to make ſome addition to, or elſe ſome ſubtraction from, the former diſpoſitions of the teſtator (m). This may alſo be either written or nuncupative.

BUT, as *nuncupative* wills and codicils, (which were formerly more in uſe than at preſent, when the art of writing is become more univerſal) are liable to great impoſitions, and may occaſion many perjuries, the ſtatute of frauds, 29 Car. II. c. 3. enacts; 1. That no written will ſhall be revoked or altered by a ſubſequent nuncupative one, except the ſame be in the lifetime of the teſtator reduced to writing, and read over to him, and approved; and unleſs the ſame be proved to have been ſo done by the oaths of three witneſſes at the leaſt; who, by ſtatute 4 & 5 Ann. c. 16. muſt be ſuch as are admiſſible upon trials at common law. 2. That no nuncupative will ſhall in any wiſe be good, where the eſtate bequeathed exceeds 30*l*, unleſs proved by three ſuch witneſſes, preſent at the making thereof (the Roman law requiring ſeven (n) and unleſs they or ſome of them were ſpecially required to bear witneſs thereto by the teſtator himſelf,

(m) Godolph. p. 1. c. 1. § 3. (n) *Inſt.* 2. 10. 14.

ſelf, and unleſs it was made in his laſt ſickneſs, in his own habitation or dwelling-houſe, or where he had been previouſly reſident ten days at the leaſt, except he be ſurprized with ſickneſs on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will ſhall be proved by the witneſſes after ſix months from the making, unleſs it were put in writing within ſix days. Nor ſhall it be proved till fourteen days after the death of the teſtator, nor till proceſs hath firſt iſſued to call in the widow, or next of kin, to conteſt it if they think proper. Thus has the legiſlature provided againſt any frauds in ſetting up nuncupative wills, by ſo numerous a train of requiſites, that the thing itſelf is fallen into diſuſe; and hardly ever heard of, but in the only inſtance where favour ought to be ſhewn to it, when the teſtator is ſurprized by ſudden and violent ſickneſs. The teſtamentary words muſt be ſpoken with an intent to bequeath, not any looſe idle diſcourſe in his illneſs; for he muſt require the by-ſtanders to bear witneſs of ſuch his intention: the will muſt be made at home, or among his family or friends, unleſs by unavoidable accident; to prevent impoſitions from ſtrangers: it muſt be in his *laſt* ſickneſs; for, if he recovers, he may alter his diſpoſitions, and has time to make a written will: it muſt not be proved at too long a diſtance from the teſtator's death, leſt the words ſhould eſcape the memory of the witneſſes; nor yet too haſtily and without notice, leſt the family of the teſtator ſhould be put to inconvenience, or ſurpriſed.

As to *written* wills, they need not any witneſs of their publication. I ſpeak not here of deviſes of lands, which are entirely another thing, a conveyance by ſtatute, unknown to the feodal or common law, and not under the ſame juriſdiction as perſonal teſtaments. But a teſtament of chattels, written in the teſtator's own hand, though it has neither his name nor ſeal to it, nor witneſſes preſent at its publication, is good; provided ſufficient proof can be had that it is his hand-writing (o). And though written in another man's hand, and never ſigned by the teſtator, yet if proved to be

(o) Godolph. p. 1. c. 21. Gilb. Rep. 260.

according to his inſtructions and approved by him, it hath been held a good teſtament of the perſonal eſtate (d). Yet it is the ſafer, and more prudent way, and leaves leſs in the breaſt of the eccleſiaſtical judge, if it be ſigned or ſealed by the teſtator, and publiſhed in the preſence of witneſſes; which laſt was always required in the time of Bracton (q); or, rather, he in this reſpect has implicitly copied the rule of the civil law.

No teſtament is of any effect till after the death of the teſtator. "*Nam omne teſtamentum morte conſummatum eſt*; *et* "*voluntas teſtatoris eſt ambulatoria uſque ad mortem* (r)." And therefore, if there be many teſtaments, the laſt overthrows all the former (s): but the republication of a former will revokes one of a later date, and eſtabliſhes the firſt again (t).

HENCE it follows, that teſtaments may be avoided three ways: 1. If made by a perſon labouring under any of the incapacities before-mentioned: 2. By making another teſtament of a later date: and, 3. By cancelling or revoking it. For, though I make a laſt will and teſtament irrevocable in the ſtrongeſt words, yet I am at liberty to revoke it: becauſe my own act or words cannot alter the diſpoſition of law, ſo as to make that irrevocable, which is in its own nature revocable (u). For this, ſaith lord Bacon (w), would be for a man to deprive himſelf of that, which of all other things is moſt incident to human condition; and that is alteration or repentance. It hath alſo been held, that, without an expreſs revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a preſumptive or implied revocation of his former will, which he made in his ſtate of celibacy (x). The Romans were alſo wont to ſet aſide teſtaments as being *inofficioſa*, deficient in natural duty, if they diſinherited or totally paſſed by (with-

(p) Comyns. 452, 3, 4.
(q) *l.* 2. *c.* 26.
(r) Co. Litt. 112.
(s) Litt. § 168. Perk. 478.
(t) Perk. 479.
(u) 8 Rep. 82.
(w) Elem. c. 19.
(x) Lord Raym. 441. 1 P. Wms. 304.

out

out aſſigning a true and ſufficient reaſon (y) any of the children of the teſtator (z). But if the child had any legacy, though ever ſo ſmall, it was a proof that the teſtator had not loſt his memory or his reaſon, which otherwiſe the law preſumed; but was then ſuppoſed to have acted thus for ſome ſubſtantial cauſe: and in ſuch caſe no *querela inofficioſi teſtamenti* was allowed. Hence probably has ariſen that groundleſs vulgar error, of the neceſſity of leaving the heir a ſhilling or ſome other expreſs legacy, in order to diſinherit him effectually: whereas the law of England makes no ſuch wild ſuppoſitions of forgetfulneſs or inſanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficioſi*, to ſet aſide ſuch a teſtament.

WE are next to conſider, *fourthly*, what is an executor, and what is an adminiſtrator; and how they are both to be appointed.

AN executor is he to whom another man commits by will the execution of that his laſt will and teſtament. And all perſons are capable of being executors, that are capable of making wills, and many others beſides; as feme-coverts, and infants: nay, even infants unborn, or *in ventre ſa mere*, may be made executors (a). But no infant can act as ſuch till the age of ſeventeen years; till which time adminiſtration muſt be granted to ſome other *durante minore aetate* (b). In like manner as it may be granted *durante abſentia*, or *pendente lite*; when the executor is out of the realm (c), or when a ſuit is commenced in the eccleſiaſtical court touching the validity of the will (d). This appointment of an executor is eſſential to the making of a will (e): and it may be performed either by expreſs words, or ſuch as ſtrongly imply the ſame. But if the teſtator makes his will, without naming any executors, or if he names incapable perſons, or if the executors named refuſe to act; in any of theſe caſes, the or-

(y) See Book I. ch. 16.
(z) *Inſt.* 2. 18. 1.
(a) Weſt. Symb. p. 1. § 635.
(b) Went. Off. Ex. c. 18.
(c) 1 Lutw. 342.
(d) 2 P. Wms 589. 590.
(e) Wentw. c. 1. Plowd. 281.

dinary muſt grant adminiſtration *cum teſtamento annexo* (f) to ſome other perſon; and then the duty of the adminiſtrator, as alſo when he is conſtituted only *durante minore aetate, &c.* of another, is very little different from that of an executor. And this was law ſo early as the reign of Henry II. when Glanvil (g) informs us that "*teſtamenti executores* "*eſſe debent ii, quos teſtator ad hoc elegerit, et curam ipſe* "*commiſerit: ſi vero teſtator nullos ad hoc nominaverit, poſſunt* "*propinqui et conſanguinei ipſius defuncti ad id faciendum ſe* "*ingerere.*"

BUT if the deceaſed died totally inteſtate, without making either will or executors, then general letters of adminiſtration muſt be granted by the ordinary to ſuch adminiſtrator as the ſtatutes of Edward the third, and Henry the eighth, before-mentioned, direct. In conſequence of which we may obſerve; 1. That the ordinary is compellable to grant adminiſtration of the goods and chattels of the wife, to the huſband, or his repreſentatives (h): and, of the huſband's effects to the widow, or next of kin; but he may grant it to either, or both, at his diſcretion (i). 2. That, among the kindred, thoſe are to be preferred that are the neareſt in degree to the inteſtate; but, of perſons in equal degree, the ordinary may take which he pleaſes (k). 3. That this *nearneſs* or propinquity of degree ſhall be reckoned according to the computation of the civilians (l); and not of the canoniſts, which the law of England adopts in the deſcent of real eſtates (m): becauſe in the civil computation the inteſtate himſelf is the *terminus, a quo* the ſeveral degrees are numbered; and not the common anceſtor, according to the rule of the canoniſts. And therefore in the firſt place the children, or (on failure of children) the parents of the deceaſed, are intitled to the adminiſtration: both which are indeed in the firſt degree; but with us (n) the children

(f) 1 Roll. Abr. 907. Comb. 20.
(g) *l* 7. *c.* 6.
(h) Cro. Car. 106. Stat. 29 Car. II. c. 3. 1 P. Wms. 381.
(i) Salk. 36. Stra. 532.
(k) Stat. 28 Hen. VIII. c. 5. See page 496.
(l) Prec. Chanc 593.
(m) See page 203, 207, 224.
(n) Godolph. p. 2. c. 34. § 1. 2 Vern. 125.

are

are allowed the preference (o). Then follow brothers (p), grandfathers (q), uncles or nephews (r), (and the females of each claſs reſpectively) and laſtly couſins. 4. The half blood is admitted to the adminiſtration as well as the whole: for they are of the kindred of the inteſtate, and only excluded from inheritances of land upon feodal reaſons. Therefore the brother of the half blood ſhall exclude the uncle of the whole blood (s): and the ordinary may grant adminiſtration to the ſiſter of the half, or the brother of the whole blood, at his own diſcretion (t). 5. If none of the kindred will take out adminiſtration, a creditor may, by cuſtom, do it (u). 6. If the executor refuſes, or dies inteſtate, the adminiſtration may be granted to the reſiduary legatee, in excluſion of the next of kin (w). And, laſtly, the ordinary may, in defect of all theſe, commit adminiſtration (as he might have done (x) before the ſtatute Edw. III.) to ſuch diſcreet perſon as he approves of: or may grant him letters *ad colligendum bona defuncti*, which neither make him executor nor adminiſtrator; his only buſineſs being to keep the goods in his ſafe cuſtody (y), and to do other acts for the benefit of ſuch as are entitled to the property of the deceaſed (z). If a baſtard, who has no kindred, being *nullius filius*, or any one elſe that has no kindred, dies inteſtate and without wife or child, it hath formerly been held (a) that the ordinary might ſeiſe his goods, and diſpoſe of them *in pios uſus*. But the

(o) In Germany there was a long diſpute, whether a man's children ſhould inherit his effects during the life of their grandfather; which depends (as we ſhall ſee hereafter) on the ſame principles as the granting of adminiſtrations. At laſt it was agreed at the diet of Arenſberg, about the middle of the tenth century, that the point ſhould be decided by combat. Accordingly, an equal number of champions being choſen on both ſides, thoſe of the children obtained the victory; and ſo the law was eſtabliſhed in their favour, that the iſſue of a perſon deceaſed ſhall be intitled to his goods and chattels in preference to his parents. (Mod. Un. Hiſt. xxix. 28.)

(p) Harris *in Nov.* 118. *c.* 2.

(q) Prec. Chanc. 527. 1 P. Wms. 41.

(r) Atk. 455.

(s) 1 Ventr. 425.

(t) Aleyn. 36. Styl. 74.

(u) Salk. 38.

(w) 1 Sid. 281. 1 Ventr. 219.

(x) Plowd. 278.

(y) Went. ch. 14.

(z) 2 Inſt. 398.

(a) Salk. 37.

uſual

uſual courſe now is for ſome one to procure letters patent, or other authority, from the king; and then the ordinary of courſe grants adminiſtration to ſuch appointee of the crown (b).

THE intereſt, veſted in an executor by the will of the deceaſed, may be continued and kept alive by the will of the ſame executor; ſo that the executor of A's executor is to all intents and purpoſes the executor and repreſentative of A himſelf (c): but the executor of A's adminiſtrator, or the adminiſtrator of A's executor, is not the repreſentative of A (d). For the power of an executor is founded upon the ſpecial confidence and actual appointment of the deceaſed; and ſuch executor is therefore allowed to tranſmit that power to another, in whom he has equal confidence: but the adminiſtrator of A is merely the officer of the ordinary, preſcribed to him by act of parliament, in whom the deceaſed has repoſed no truſt at all; and therefore, on the death of that officer, it reſults back to the ordinary to appoint another. And, with regard to the adminiſtrator of A's executor, he has clearly no privity or relation to A; being only commiſſioned to adminiſter the effects of the inteſtate executor, and not of the original teſtator. Wherefore, in both theſe caſes, and whenever the courſe of repreſentation from executor to executor is interrupted by any one adminiſtration, it is neceſſary for the ordinary to commit adminiſtration afreſh, *of the goods* of the deceaſed *not* adminiſtred by the former executor or adminiſtrator. And this adminiſtrator, *de bonis non*, is the only legal repreſentative of the deceaſed in matters of perſonal property (e). But he may, as well as an original adminiſtrator, have only a *limited* or *ſpecial* adminiſtration committed to his care, viz. of certain ſpecific effects, ſuch as a term of years and the like; the reſt being committed to others (f).

(b) 3 P. Wms. 33.
(c) Stat. 25 Edw. III. ſt. 5. c. 5. 1 Leon. 275.
(d) Bro. *Abr. tit. adminiſtrator.* 7.
(e) Styl. 225.
(f) 1 Roll. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.

HAVING

HAVING thus ſhewn what is, and who may be, an executor or adminiſtrator, I proceed now, *fifthly* and laſtly, to enquire into ſome few of the principal points of their office and duty. Theſe in general are very much the ſame in both executors and adminiſtrators; excepting, firſt, that the executor is bound to perform a will, which an adminiſtrator is not, unleſs where a teſtament is annexed to his adminiſtration, and then he differs ſtill leſs from an executor; and, ſecondly, that an executor may do many acts before he proves the will (g), but an adminiſtrator may do nothing till letters of adminiſtration are iſſued; for the former derives his power from the will and not from the probate (h), the latter owes his entirely to the appointment of the ordinary. If a ſtranger takes upon him to act as executor, without any juſt authority (as by intermeddling with the goods of the deceaſed (i), and many other tranſactions (k) he is called in law an executor of his own wrong, *de ſon tort*, and is liable to all the trouble of an executorſhip, without any of the profits or advantages: but merely doing acts of neceſſity or humanity, as locking up the goods, or burying the corps of the deceaſed, will not amount to ſuch an intermeddling, as will charge a man as executor of his own wrong (l). Such a one cannot bring an action himſelf in right of the deceaſed (m), but actions may be brought againſt him. And, in all actions by creditors againſt ſuch an officious intruder, he ſhall be named an executor, generally (n); for the moſt obvious concluſion, which ſtrangers can form from his conduct, is that he hath a will of the deceaſed, wherein he is named executor, but hath not yet taken probate thereof (o). He is chargeable with the debts of the deceaſed, ſo far as aſſets come to his hands (p): and, as againſt creditors in general, ſhall be allowed all payments made to any other creditor in the ſame or a

(g) Wentw. ch. 3.
(h) Comyns. 151.
(i) 5 Rep. 33, 34.
(k) Wentw. ch. 14. Stat. 43 Eliz. c. 8.
(l) Dyer. 166.
(m) Bro. *Abr. t. adminiſtrator.* 8.
(n) 5 Rep. 31.
(o) 12 Mod. 471.
(p) Dyer. 166.

ſuperior

ſuperior degree (q), himſelf only excepted (r). And though, as againſt the rightful executor or adminiſtrator, he cannot plead ſuch payment, yet it ſhall be allowed him in mitigation of damages (s): unleſs perhaps upon a deficiency of aſſets, whereby the rightful executor may be prevented from ſatisfying his own debt (t). But let us now ſee what are the power and duty of a rightful executor or adminiſtrator.

1. HE muſt *bury* the deceaſed in a manner ſuitable to the eſtate which he leaves behind him. Neceſſary funeral expences are allowed, previous to all other debts and charges; but if the executor or adminiſtrator be extravagant, it is a ſpecies of *devaſtation* or waſte of the ſubſtance of the deceaſed, and ſhall only be prejudicial to himſelf, and not to the creditors or legatees of the deceaſed (u).

2. THE executor, or the adminiſtrator *durante minore aetate*, or *durante abſentia*, or *cum teſtamento annexo*, muſt *prove the will* of the deceaſed: which is done either in *common form*, which is only upon his own oath before the ordinary, or his ſurrogate; or *per teſtes*, in more ſolemn form of law, in caſe the validity of the will be diſputed (w). When the will is ſo proved, the original muſt be depoſited in the regiſtry of the ordinary; and a copy thereof in parchment is made out under the ſeal of the ordinary, and delivered to the executor or adminiſtrator, together with a certificate of its having been proved before him: all which together is uſually ſtiled the *probate*. In defect of any will, the perſon entitled to be adminiſtrator muſt alſo at this period take out letters of adminiſtration under the ſeal of the ordinary; whereby an executorial power to collect and adminiſter, that is, diſpoſe of the goods of the deceaſed, is veſted in him: and he muſt, by ſtatute 22 & 23 Car. II. c. 10. enter into a bond with ſureties, faithfully to execute his truſt. If all the goods of the deceaſed lie within the ſame juriſdiction, a probate before the ordinary, or an ad-

(q) 1 Chan. Caſ. 33.
(r) 5 Rep. 30. Moor. 527.
(s) 12 Mod. 441. 471.
(t) Wentw. ch. 14.
(u) Salk. 196. Godolph. p. 2. c. 26. § 2.
(w) Godolph. p. 1. c. 20. § 4.

miniſtration

miniſtration granted by him, are the only proper ones: but if the deceaſed had *bona notabilia*, or chattels to the value of a *hundred ſhillings*, in two diſtinct dioceſes or juriſdictions, then the will muſt be proved, or adminiſtration taken out, before the metropolitan of the province, by way of ſpecial prerogative (x); whence the court where the validity of ſuch wills is tried, and the office where they are regiſtered, are called the prerogative court, and the prerogative office, of the provinces of Canterbury and York. Lyndewode, who flouriſhed in the beginning of the fifteenth century, and was official to archbiſhop Chichele, interprets theſe hundred ſhillings to ſignify *ſolidos legales*; of which he tells us ſeventy two amounted to a pound of gold, which in his time was valued at fifty nobles or 16*l.* 13*s.* 4*d.* He therefore computes (y) that the hundred ſhillings, which conſtituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* $0\frac{1}{4}d.$ This will account for what is ſaid in our antient books, that *bona notabilia* in the dioceſe of London (z), and indeed every where elſe (a), were of the value of ten pounds by *compoſition*: for, if we purſue the calculations of Lyndewode to their full extent, and conſider that a pound of gold is now almoſt equal in value to an hundred and fifty nobles, we ſhall extend the preſent amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603 underſtood this antient rule to be meant of the ſhillings current in the reign of James I. and have therefore directed (b) that *five pounds* ſhall for the future be the ſtandard of *bona notabilia*, ſo as to make the probate fall within the archiepiſcopal prerogative. Which prerogative (properly underſtood) is grounded upon this reaſonable foundation: that, as the biſhops were themſelves originally the adminiſtrators to all inteſtates in their own dioceſe, and as the preſent adminiſtrators are in effect no other than their officers or ſubſtitutes, it was impoſſible for the biſhops, or thoſe who acted under them, to collect any goods of the deceaſed, other than ſuch as lay within

(x) 4 Inſt. 335.
(y) *Provinc. l.* 3. *t.* 13. *c. item. v. centum. & c. ſtatutum. v. laicis.*
(z) 4 Inſt. 335. Godolph. p. 2. c. 22.
(a) Plowd. 281.
(b) Can. 92.

their

their own dioceſes, beyond which their epiſcopal authority extends not. But it would be extremely troubleſome, if as many adminiſtrations were to be granted, as there are dioceſes within which the deceaſed had *bona notabilia*; beſides the uncertainty which creditors and legatees would be at, in caſe different adminiſtrators were appointed, to aſcertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently veſted in the metropolitan of each province, to make in ſuch caſes one adminiſtration ſerve for all. This accounts very ſatisfactorily for the reaſon of taking out adminiſtration to inteſtates, that have large and diffuſive property, in the prerogative court: and the probate of wills naturally follows, as was before obſerved, the power of granting adminiſtrations; in order to ſatisfy the ordinary that the deceaſed has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of adminiſtring the effects.

3. THE executor or adminiſtrator is to make an *inventory* (c) of all the goods and chattels, whether in poſſeſſion or action, of the deceaſed; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

4. HE is to *collect* all the goods and chattels ſo inventoried; and to that end he has very large powers and intereſts conferred on him by law; being the repreſentative of the deceaſed (d), and having the ſame property in his goods as the principal had when living, and the ſame remedies to recover them. And, if there be two or more executors, a ſale or releaſe by one of them ſhall be good againſt all the reſt (e); but in caſe of adminiſtrators it is otherwiſe (f). Whatever is ſo recovered, that is of a ſaleable nature and may be converted into ready money, is called *aſſets* in the hands of the executor or adminiſtrator (g); that is, ſufficient or enough (from the French *aſſez*) to make him chargeable to a creditor or legatee, ſo far as ſuch goods and chattels extend.

(c) Stat. 21 Hen. VIII. c. 5.
(d) Co. Litt. 209.
(e) Dyer. 23.
(f) Atk. 460.
(g) See page 244.

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Whatever aſſets ſo come to his hands he may convert into ready money, to anſwer the demands that may be made upon him: which are the next thing to be conſidered; for,

5. THE executor or adminiſtrator muſt *pay* the *debts* of the deceaſed. In payment of debts he muſt obſerve the rules of propriety; otherwiſe, on deficiency of aſſets, if he pays thoſe of a lower degree firſt, he muſt anſwer thoſe of a higher out of his own eſtate. And, firſt, he may pay all funeral charges, and the expence of proving the will, and the like. Secondly, debts due to the king on record or ſpecialty (h). Thirdly, ſuch debts as are by particular ſtatutes to be preferred to all others; as the forfeitures for not burying in woollen (i), money due on poor rates (k), for letters to the poſt-office (l), and ſome other. Fourthly, debts of record; as judgments (docketted according to the ſtatute 4 & 5. W. & M. c. 20.) ſtatutes, and recognizances (m). Fifthly, debts due on ſpecial contracts; as for rent, (for which the leſſor, has often a better remedy in his own hands by diſtraining) or upon bonds, covenants, and the like, under ſeal (n). Laſtly, debts on ſimple contracts, viz. upon notes unſealed, and verbal promiſes. Among theſe ſimple contracts, ſervants wages are by ſome (o) with reaſon preferred to any other: and ſo ſtood the antient law, according to Bracton (p) and Fleta (q), who reckon, among the firſt debts to be paid, *ſervitia ſervientium et ſtipendia famulorum.* Among debts of equal degree, the executor or adminiſtrator is allowed to pay himſelf firſt by retaining in his hands ſo much as his debt amounts to (r). But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to ſtrive who ſhould firſt take poſſeſſion of the goods of the deceaſed; and would beſides be taking advantage of their own wrong, which is contrary to the rule of law (s). If a credi-

(h) 1. And. 129.
(i) Stat. 30 Car. II. c. 3.
(k) Stat. 17. Geo. II. c. 38.
(l) Stat. 9. Ann c. 10.
(m) 4. Rep. 60. Cro. Car. 363.
(n) Wentw. ch. 12.
(o) 1. Roll. Abr. 927.
(p) *l.* 2. c. 26.
(q) *l.* 2. *c.* 57. §. 10.
(r) 10. Mod. 496.
(s) 5. Rep. 30.

tor

tor conſtitutes his debtor his executor, this is a releaſe or diſcharge of the debt, whether the executor acts or no (t); provided there be aſſets ſufficient to pay the teſtator's debts: for, though this diſcharge of the debt ſhall take place of all legacies, yet it were unfair to defraud the teſtator's creditors of their juſt debts by a releaſe which is abſolutely voluntary (u). Alſo, if no ſuit is commenced againſt him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the reſt: for, without a ſuit commenced, the executor has no legal notice of the debt (w).

6. WHEN the debts are all diſcharged, the *legacies* claim the next regard; which are to be paid by the executor ſo far as his aſſets will extend: but he may not give himſelf the preference herein, as in the caſe of debts (x).

A LEGACY is a bequeſt, or gift, of goods and chattles by teſtament; and the perſon to whom it is given is ſtiled the legatee: which every perſon is capable of being, unleſs particularly diſabled by the common law or ſtatutes, as traitors, papiſts, and ſome others. This bequeſt transfers an inchoate property to the legatee; but the legacy is not perfect without the aſſent of the executor; for if I have a *general* or *pecuniary* legacy of 100 *l*, or a *ſpecific* one of a piece of plate, I cannot in either caſe take it without the conſent of the executor (y). For in him all the chattles are veſted: and it is his buſineſs firſt of all to ſee whether there is a ſufficient fund left to pay the debts of the teſtator: the rule of equity being, that a man muſt be juſt, before he is permitted to be generous; or, as Bracton expreſſes the ſenſe of our antient law (z), "*de bonis defuncti primo deducenda ſunt ea quae ſunt neceſſitatis, et poſtea quae ſunt utilitatis, et ultimo quae ſunt voluntatis.*" And in caſe of a deficiency of aſſets, all the *general* legacies muſt abate proportionably, in order to pay the debts;

(t) Plowd. 184. Salk. 299.
(u) Salk. 303. 1. Roll. Abr. 921.
(w) Dyer. 32. 2. Leon. 60.
(x) 2. Vern. 434. 2. P. Wms. 25.
(y) Co Litt. 111. Aleyn. 39.
(z) *l.* 2. c. 26.

but

but a *ſpecific* legacy (of a piece of plate, a horſe, or the like) is not to abate at all, or allow any thing by way of abatement, unleſs there be not ſufficient without it (a). Upon the ſame principle, if the legatees have been paid their legacies, they are afterwards bound to refund a ratable part, in caſe debts come in, more than ſufficient to exhauſt the *reſiduum* after the legacies paid (b). And this law is as old as Bracton and Fleta, who tell us, (c) "*ſi plura ſint debita, vel plus legatum fuerit, ad quae catalla defuncti non ſufficiant, fiat ubique defalcatio, excepto regis privilegio.*"

IF the legatee dies before the teſtator, the legacy is a loſt or *lapſed* legacy, and ſhall ſink into the *reſiduum*. And if a *contingent* legacy be left to any one; as, *when* he attains, or *if* he attains, the age of twenty one; and he dies before that time, it is a lapſed legacy (d). But a legacy to one, *to be paid* when he attains the age of twenty one years, is a *veſted* legacy; an intereſt which commences *in praeſenti*, although it be *ſolvendum in futuro:* and, if the legatee dies before that age, his repreſentatives ſhall receive it out of the teſtator's perſonal eſtate, at the ſame time that it would have become payable, in caſe the legatee had lived. This diſtinction is borrowed from the civil law (e); and its adoption in our courts is not ſo much owing to its intrinſic equity, as to its having been before adopted by the eccleſiaſtical courts. For, ſince the chancery has a concurrent juriſdiction with them, in regard to the recovery of legacies, it was reaſonable that the ſubject ſhould have the ſame meaſure of juſtice in whatever court he ſued (f). But if ſuch legacies be charged upon a real eſtate, in both caſes they ſhall lapſe for the benefit of the heir (g); for, with regard to deviſes affecting lands, the eccleſiaſtical court hath no concurrent juriſdiction. And, in caſe of a veſted legacy, due immediately, and charged on land or money in the funds, which yield an immedi-

(a) 2 Vern. 111.
(b) *Ibid.* 205.
(c) Bract. *l.* 2. *c.* 26. Fleta. *l.* 2. *c.* 57. §. 11.
(d) Dyer. 59. 1. Equ. Caſ. abr. 295.
(e) *Ff.* 35. 1. 1 & 2.
(f) Equ. Caſ. abr. 295.
(g) 2 P. Wms. 601.

ate profit, intereſt ſhall be payable thereon from the teſtator's death; but if charged only on the perſonal eſtate, which cannot be immediately got in, it ſhall carry intereſt only from the end of the year after the death of the teſtator (h).

Besides theſe formal legacies, contained in a man's will and teſtament, there is alſo permitted another death-bed diſpoſition of property; which is called a donation *cauſa mortis*. And that is, when a perſon in his laſt ſickneſs, apprehending his diſſolution near, delivers or cauſes to be delivered to another the poſſeſſion of any perſonal goods, (under which have been included bonds, and bills drawn by the deceaſed upon his banker) to keep in caſe of his deceaſe. This gift, if the donor dies, needs not the aſſent of his executor: yet it ſhall not prevail againſt creditors; and is accompanied with this implied truſt, that, if the donor lives, the property thereof ſhall revert to himſelf, being only given in contemplation of death, or *mortis cauſa* (i). This method of donation might have ſubſiſted in a ſtate of nature, being always accompanied with delivery of actual poſſeſſion (k); and ſo far differs from a teſtamentary diſpoſition: but ſeems to have been handed to us from the civil lawyers (l), who themſelves borrowed it from the Greeks (m).

7. When all the debts and particular legacies are diſcharged, the ſurplus or *reſiduum* muſt be paid to the reſiduary legatee, if any be appointed by the will; and if there be none, it was long a ſettled notion that it devolved to the executor's own uſe, by virtue of his executorſhip (n). But, whatever ground there might have been formerly for this opinion, it ſeems now to be underſtood (o) with this reſtriction; that, although where the executor has no legacy at all the *reſiduum* ſhall in general be his own, yet wherever there is ſufficient on the face of a will, (by means of

(h) 2 P. Wms. 26, 27.
(i) Prec. Chan. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.
(k) Law of forfeit. 16.
(l) *Inſt.* 2. 7. 1. *Ff. l.* 39. *t.* 6.
(m) There is a very complete *donatio mortis cauſa*, in the Odyſſey, b. 17. v. 78, made by Telemachus to his friend Piraeus; and another by Hercules, in the Alceſtes of Euripides, v. 1020.
(n) Perkins. 525.
(o) Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 559.

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a competent legacy or otherwiſe) to imply that the teſtator intended his executor ſhould *not* have the reſidue, the undeviſed ſurplus of the eſtate ſhall go to the next of kin, the executor then ſtanding upon exactly the ſame footing as an adminiſtrator: concerning whom indeed there formerly was much debate (p), whether or no he could be compelled to make any diſtribution of the inteſtate's eſtate. For though (after the adminiſtration was taken in effect from the ordinary, and transferred to the relations of the deceaſed) the ſpiritual court endeavoured to compel a diſtribution, and took bonds of the adminiſtrator for that purpoſe, they were prohibited by the temporal courts, and the bonds declared void at law (q). And the right of the huſband not only to adminiſter, but alſo to enjoy excluſively, the effects of his deceaſed wife, depends ſtill on this doctrine of the common law: the ſtatute 29 Car. II. declaring only that the ſtatute of diſtributions does not extend to this caſe. But now theſe controverſies are quite at an end, for by the ſtatute 22 & 23 Car. II. c. 10. it is enacted, that the ſurpluſage of inteſtates' eſtates, except of femes covert (r), ſhall (after the expiration of one full year from the death of the inteſtate) be diſtributed in the following manner. One third ſhall go to the widow of the inteſtate, and the reſidue in equal proportions to his children, or, if dead, to their repreſentatives; that is, their lineal deſcendants: if there are no children or legal repreſentatives ſubſiſting, then a moiety ſhall go to the widow, and a moiety to the next of kindred in equal degree and their repreſentatives: if no widow, the whole ſhall go to the children: if neither widow nor children, the whole ſhall be diſtributed among the next of kin in equal degree, and their repreſentatives: but no repreſentatives are admitted, among collaterals, farther than the children of the inteſtate's brothers and ſiſters (s). The next of kindred, here referred to, are to be inveſtigated by the ſame rules of conſanguinity, as thoſe who are intitled to letters of adminiſtration; of whom we have ſufficiently ſpoken (t). And therefore by this ſtatute

(p) Godolph. p. 2. c. 32.
(q) 1 Lev. 233. Cart. 125. 2. P. Wms. 447.
(r) Stat. 29. Car. II. c. 3. § 25.
(s) Raym. 496. Lord. Raym. 571.
(t) pag. 504

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(p) Godolph. p. 2. c. 32.
(q) 1 Lev. 233. Cart. 125. 2. P. Wms. 447.
(r) Stat. 29. Car. II. c. 3. § 25.
(s) Raym. 496. Lord. Raym. 571.
(t) pag. 504

the mother, as well as the father, ſucceeded to all the perſonal effects of their children, who died inteſtate and without wife or iſſue: in excluſion of the other ſons and daughters, the brothers and ſiſters of the deceaſed. And ſo the law ſtill remains with reſpect to the father; but by ſtatute 1 Jac. II. c. 17. if the father be dead, and any of the children die inteſtate without wife or iſſue, in the lifetime of the mother, ſhe and each of the remaining children, or their repreſentatives, ſhall divide his effects in equal portions.

IT is obvious to obſerve, how near a reſemblance this ſtatute of diſtributions bears to our antient Engliſh law, *de rationabili parte bonorum*, ſpoken of at the beginning of this chapter (u); and which ſir Edward Coke (w) himſelf, though he doubted the generality of its reſtraint on the power of deviſing by will, held to be univerſally binding upon the adminiſtrator or executor, in the caſe of either a total or partial inteſtacy. It alſo bears ſome reſemblance to the Roman law of ſucceſſions *ab inteſtato* (x): which, and becauſe the act was alſo penned by an eminent civilian (y), has occaſioned a notion that the parliament of England copied it from the Roman praetor: though indeed it is little more than a reſtoration, with ſome refinements and regulations of our old conſtitutional law; which prevailed as an eſtabliſhed right and cuſtom from the time of king Canute downwards, many centuries before Juſtinian's laws were known or heard of in the weſtern parts of Europe. So likewiſe there is another part of the ſtatute of diſtributions, where directions are given, that no child of the inteſtate, (except his heir at law) on whom he ſettled in his life-time any eſtate in lands, or pecuniary portion, equal to the diſtributive ſhares of the other children, ſhall have any part of the ſurpluſage with their brothers and ſiſters; but if the eſtates ſo given

(u) pag. 492.

(w) 2 Inſt. 33.

(x) The general rule of ſuch ſucceſſions was this: 1. The children or lineal deſcendants in equal portions. 2. On failure of theſe, the parents or lineal aſcendants, and with them the brethren or ſiſters of the whole blood; or, if the parents were dead, all the brethren and ſiſters, together with the repreſentatives of a brother or ſiſter deceaſed. 3. The next collateral relations in equal degree. 4. The huſband or wife of the deceaſed. *Ff.* 38. 15. 1. *Nov.* 118. *c.* 1, 2, 3. 127. *c.* 1.

(y) Sir Walter Walker. Lord Raym. 574.

them,

them, by way of advancement, are not quite equivalent to the other ſhares, the children ſo advanced ſhall now have ſo much as will make them equal. This juſt and equitable proviſion hath been alſo ſaid to to be derived from the *collatio bonorum* of the imperial law (z). which it certainly reſembles in ſome points, though it differs widely in others, But it may not be amiſs to obſerve, that with regard to goods and chattles, this is part of the antient cuſtom of London, of the province of York, and of our ſiſter kingdom of Scotland: and, with regard to lands deſcending in coparcenary, that it hath always been, and ſtill is, the common law of England, under the name of *hotchpot* (a)

BEFORE I quit this ſubject, I muſt however acknowlege, that the doctrine and limits of repreſentation, laid down in the ſtatute of diſtributions, ſeem to have been principally borrowed from the civil law: whereby it will ſometimes happen that perſonal eſtates are divided *per capita*, and ſometimes *per ſtirpes*; whereas the common law knows no other rule of ſucceſſion but that *per ſtirpes* only (b). They are divided *per capita*, to every man an equal ſhare, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure repraeſentationis*, in the right of another perſon. As if the next of kin be the inteſtate's three brothers, A, B, and C; here his eſtate is divided into three equal portions, and diſtributed *per capita*, one to each: but if one of theſe brothers, A, had been dead leaving three children, and another, B, leaving two; then the diſtribution muſt have been *per ſtirpes*; viz. one third to A's three children, another third to B's two children, and the remaining third to C the ſurviving brother: yet if C had alſo been dead, without iſſue, then A's and B's five children, being all in equal degree to the inteſtate, would take in their own rights *per capita*, viz. each of them one fifth part (c).

THE ſtatute of diſtributions expreſsly excepts and reſerves the cuſtoms of the city of London, of the province of York,

(z) *Ff.* 37. 6. 1.
(a) See ch. 12. pag. 191.
(b) See ch. 14. pag. 217.
(c) Prec. Chanc. 54.

and

and of all other places having peculiar cuſtoms of diſtributing inteſtates' effects. So that, though in thoſe places the reſtraint of deviſing is removed by the ſtatutes formerly mentioned (d), their antient cuſtoms remain in full force, with reſpect to the eſtates of inteſtates. I ſhall therefore conclude this chapter, and with it the preſent book, with a few remarks on thoſe cuſtoms.

In the firſt place we may obſerve, that in the city of London (e), and province of York (f), as well as in the kingdom of Scotland (g), and therefore probably alſo in Wales, (concerning which there is little to be gathered, but from the ſtatute 7 & 8 W III. c. 38.) the effects of the inteſtate, after payment of his debts, are in general divided according to the antient univerſal doctrine of the *pars rationabilis*. If the deceaſed leaves a widow and children, his ſubſtance (deducting the widow's apparel and furniture of her bed chamber, which in London is called the *widow's chamber*) is divided into three parts; one of which belongs to the widow, another to the children, and the third to the adminiſtrator: if only a widow, or only children, they ſhall reſpectively in either caſe, take one moiety, and the adminiſtrator the other (h): if neither widow nor child, the adminiſtrator ſhall have the whole (i). And this portion, or *dead man*'s part, the adminiſtrator was wont to apply to his own uſe (k), till the ſtatute 1 Jac. II. c. 17. declared that the ſame ſhould be ſubject to the ſtatutes of diſtribution. So that if a man dies worth 1800*l.* leaving a widow and two children, the eſtate ſhall be divided into eighteen parts; whereof the widow ſhall have eight, ſix by the cuſtom and two by the ſtatute; and each of the children five, three by the cuſtom and two by the ſtatute: if he leaves a widow and one child, they ſhall each have a moiety of the whole, or nine ſuch eighteenth parts, ſix by the cuſtom and three by the ſtatute: if he leaves a widow and no child, the widow ſhall have three fourths of the whole, two by the cuſtom and one by the ſtatute: and the remaining fourth ſhall

(d) pag. 493.
(e) Lord Raym. 1329.
(f) 2 Burn. eccl. law. 746.
(g) *Ibid.* 782.
(h) 1 P. Wms. 341. Salk. 246.
(i) 2 Show. 175.
(k) 2 Freem. 85. 1 Vern. 133.

go by the ſtatute to the next of kin. It is alſo to be obſerved, that if the wife be provided for by a jointure before marriage, in bar of her cuſtomary part, it puts her in a ſtate of non-entity, with regard to the cuſtom only (l); but ſhe ſhall be intitled to her ſhare of the dead man's part under the ſtatute of diſtributions, unleſs barred by ſpecial agreement (m). And if any of the children are advanced by the father in his life-time with any ſum of money (not amounting to their full proportionable part) they ſhall bring that proportion into hotchpot with the reſt of the brothers and ſiſters, but not with the widow, before they are intitled to any benefit under the cuſtom (n): but, if they are fully advanced, the cuſtom intitles them to no farther dividend (o).

THUS far in the main the cuſtoms of London and of York agree: but, beſides certain other leſs material variations, there are two principal points in which they conſiderably differ. One is, that in London the ſhare of the children (or orphanage part) is not fully veſted in them till the age of twenty one, before which they cannot diſpoſe of it by teſtament (p): and, if they die under that age, whether ſole or married, their ſhare ſhall ſurvive to the other children; but, after the age of twenty one, it is free from any orphanage cuſtom, and, in caſe of inteſtacy, ſhall fall under the ſtatute of diſtributions (q). The other, that in the province of York, the heir at common law, who inherits any lands either in fee or in tail, is excluded from any filial portion or reaſonable part (r). But, notwithſtanding theſe provincial variations, the cuſtoms appear to be ſubſtantially one and the ſame. And, as a ſimilar policy formerly prevailed in every part of the iſland, we may fairly conclude the whole to be of Britiſh original; or, if derived from the Roman law of ſucceſſions, to have been drawn from that fountain much

(l) 2 Vern. 665. 3. P. Wms. 16.
(m) 1 Vern. 15. 2 Chan. Rep. 252.
(n) 2 Freem. 279. 1 Equ. Caſ. abr. 155. 2 P. Wms. 526.
(o) 2 P. Wms. 527.
(p) 2 Vern. 558.
(q) Prec. Chan 537.
(r) 2 Burn. 754.

earlier

earlier than the time of Juſtinian, from whoſe conſtitutions in many points (particularly in the advantages given to the widow) it very conſiderably differs: though it is not improbable that the reſemblances which yet remain may be owing to the Roman uſages; introduced in the time of Claudius Caeſar, (who eſtabliſhed a colony in Britain to inſtruct the natives in legal knowledge (s) inculcated and diffuſed by Papinian (who preſided at York as *praefectus praetorio* under the emperors Severus and Caracalla) (t) and continued by his ſucceſſors till the final departure of the Romans in the beginning of the fifth century after Chriſt.

(s) Tacit. *Annal. l.* 12. *c.* 32. (t) Selden *in Fletam. cap.* 4. §. 3.



THE END OF THE SECOND BOOK.

APPENDIX.

N° I.

Vetus Carta FEOFFAMENTI.

SCIANT preſentes et futuri, quod ego Willielmus, filius Willielmi de Segenho, dedi, conceſſi, et hac preſenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam ſumma pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mare: HABENDAM ET TENENDAM totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus ſuis, et ſuis aſſignatis, de capitalibus dominis feodi: REDDENDO et faciendo annuatim eiſdem dominis capitalibus ſervitia inde debita et conſueta: ET ego predictus Willielmus, et heredes mei, et mei aſſignati, totam predictam acram terre, cum omnibus ſuis pertinentiis, predicto Johanni de Saleford, et heredibus ſuis, et ſuis aſſignatis, contra omnes gentes warrantizabimus in perpetuum. IN CUJUS rei teſtimonium huic preſenti carte ſigillum meum appoſui: HIJS teſtibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, et aliis. DATA apud Saleford die Veneris proximo ante feſtum ſancte Margarete virginis, anno regni regis EDWARDI filii regis EDWARDI ſexto.

Premiſes.

Habendum, and *Tenendum*.

Reddendum.

Warranty.

Concluſion.

(L. S.)

MEMORANDUM, quod die et anno infraſcriptis plena et pacifica ſeiſina acra infraſpecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johanni de Saleford, in propriis perſonis ſuis, ſecundum tenorem et effectum carte infraſcripte, in preſentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

Livery of ſeiſin endorſed.

N°. II.

N°. II.

A modern Conveyance by LEASE *and* RELEASE.

§. 1. LEASE, *or* BARGAIN *and* SALE, *for a year.*

Premiſes. THIS INDENTURE, made the the third day of September, in the twenty-firſt year of the reign of our ſovereign lord GEORGE the ſecond by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and ſo forth, and in the year of our Lord one thouſand, ſeven hundred, and forty ſeven, between Abraham Barker of Dale Hall in the county of Norfolk, eſquire, and Cecilia his wife, of the one part, and David Edwards of Lincoln's Inn in the county of Middleſex, eſquire, and Francis Golding of the city of Norwich, clerk, of the other part, witneſſeth; that the ſaid Abraham Barker and Cecilia his wife, in conſideration of five ſhillings of lawful money of Great Britain to them in hand paid by the ſaid David Edwards and Francis Golding at or before the enſealing and delivery of theſe preſents, (the receipt whereof is hereby acknowleded) and for other good cauſes and conſiderations them the ſaid Abraham Barker and Cecilia his wife hereunto ſpecially moving, HAVE bargained and ſold, and by theſe preſents do, and each of them doth, bargain and ſell, unto the ſaid David Edwards and Francis Golding, their executors, adminiſtrators, and aſſigns, ALL that the capital meſſuage, called Dale Hall in the pariſh of Dale in the ſaid county of Norfolk, wherein the ſaid Abraham Barker and Cecilia his wife now dwell, and all thoſe their lands in the ſaid pariſh of Dale called or known by the name of Wilſon's farm, containing by eſtimation five hundred and forty acres, be the ſame more or leſs, together with all and ſingular houſes, dovehouſes, barns, buildings, ſtables, yards, gardens, orchards, lands, tenements, meadows, paſtures, feedings, commons, woods, underwoods, ways, waters, watercourſes, fiſhings, privileges, profits, eaſements, commodities, advantages, emoluments, hereditaments, and appurtenances whatſoever to the ſaid capital meſſuage and farm belonging or appertaining, or with the ſame uſed or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the ſame or any part thereof; and the reverſion and reverſions, remainder and remainders, yearly and other rents, iſſues, and profits thereof, and of every part and parcel thereof: TO HAVE AND TO HOLD the ſaid capital meſſuage, lands, tenements, hereditaments and all and ſingular other the premiſes herein before mentioned or intended

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Bargain and ſale.

Parcels.

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tended to be bargained and ſold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, unto the ſaid David Edwards and Francis Golding, their executors, adminiſtrators, and aſſigns, from the day next before the day of the date of theſe preſents, for and during, and unto the full end and term of, one whole year from thence next enſuing and fully to be complete and ended: YIELDING and *Reddendum.* paying therefore unto the ſaid Abraham Barker, and Cecilia his wife, and their heirs and aſſigns, the yearly rent of one peppercorn at the expiration of the ſaid term, if the ſame ſhall be lawfully demanded: TO THE INTENT and purpoſe, that by *Intent.* virtue of theſe preſents, and of the ſtatute for transferring uſes into poſſeſſion, the ſaid David Edwards and Francis Golding may be in the actual poſſeſſion of the premiſes, and be thereby enabled to take and accept a grant and releaſe of the freehold, reverſion, and inheritance of the ſame premiſes, and of every part and parcel thereof, to them, their heirs and aſſigns; to the uſes, and upon the truſts, thereof to be declared by another indenture, intended to bear date the day next after the day of the date hereof. IN WITNESS whereof the parties to theſe *Concluſion.* preſents their hands and ſeals have ſubſcribed and ſet, the day and year firſt above written.

Sealed, and delivered, being firſt duly ſtamped, in the preſence of George Carter. William Browne	Abraham Barker.	(L. S.)
	Cecilia Barker.	(L. S.)
	David Edwards.	(L. S.)
	Francis Golding.	(L. S.)

§. 2. *Deed of* RELEASE.

THIS INDENTURE of five parts, made the fourth day of *Premiſes.* September, in the twenty-firſt year of the reign of our ſovereign lord GEORGE the ſecond by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and ſo forth, and in the year of our Lord one thouſand, ſeven hundred, and forty-ſeven, between Abraham Barker, of Dale Hall *Parties.* in the county of Norfolk, eſquire, and Cecilia his wife, of the firſt part; David Edwards of Lincoln's Inn in the county of Middleſex, eſquire, executor of the laſt will and teſtament of Lewis Edwards, of Cowbridge in the county of Glamorgan, gentleman, his late father, deceaſed, and Francis Golding of the city of Norwich, clerk, of the ſecond part; Charles Browne of Enſtone in the county of Oxford, gentleman, and Richard More of the city of Briſtol, merchant, of the third part; John Barker, eſquire, ſon and heir apparent of the ſaid Abraham Barker, of the fourth part; and Katherine Edwards, ſpinſter, one of the ſiſters of the ſaid David Edwards, of the

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fifth part. WHEREAS a marriage is intended, by the permiſſion of God, to be ſhortly had and ſolemnized between the ſaid John Barker and Katherine Edwards: NOW THIS INDENTURE WITNESSETH, that in conſideration of the ſaid intended marriage, and of the ſum of five thouſand pounds, of good and lawful money of Great Britain, to the ſaid Abraham Barker, (by and with the conſent and agreement of the ſaid John Barker, and Katherine Edwards, teſtified by their being parties to, and their ſealing and delivery of theſe preſents,) by the ſaid David Edwards in hand paid at or before the enſealing and delivery hereof, being the marriage portion of the ſaid Katherine Edwards, bequeathed to her by the laſt will and teſtament of the ſaid Lewis Edwards, her late father, deceaſed; the receipt and payment whereof the ſaid Abraham Barker doth hereby acknowlege, and thereof, and of every part and parcel thereof, they the ſaid Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, releaſe, acquit, and diſcharge the ſaid David Edwards, his executors, and adminiſtrators, for ever by theſe preſents: and for providing a competent jointure and proviſion of maintenance for the ſaid Katherine Edwards, in caſe ſhe ſhall, after the ſaid intended marriage had, ſurvive and overlive the ſaid John Barker her intended huſband: and for ſettling and aſſuring the capital meſſuage, lands, tenements, and hereditaments, herein after mentioned, unto ſuch uſes, and upon ſuch truſts, as are herein after expreſſed and declared: and for and in conſideration of the ſum of five ſhillings of lawful money of Great Britain to the ſaid Abraham Barker and Cecilia his wife in hand paid by the ſaid David Edwards and Francis Golding, and of ten ſhillings of like lawful money to them alſo in hand paid by the ſaid Charles Browne and Richard More, at or before the enſealing and delivery hereof (the ſeveral receipts whereof are hereby reſpectively acknowledged,) they the ſaid Abraham Barker and Cecilia his wife, HAVE, and each of them hath, granted, bargained, ſold, releaſed, and confirmed, and by theſe preſents do, and each of them doth, grant, bargain, ſell, releaſe, and confirm unto the ſaid David Edwards and Francis Golding, their heirs and aſſigns, ALL that capital meſſuage called Dale Hall, in the pariſh of Dale in the ſaid county of Norfolk, wherein the ſaid Abraham Barker and Cecilia his wife now dwell, and all thoſe their lands in the ſaid pariſh of Dale called or known by the name of Wilſon's farm, containing by eſtimation five hundred and forty acres, be the ſame more or leſs, together with all and ſingular houſes, dovehouſes, barns, buildings, ſtables, yards, gardens, orchards, lands, tenements, meadows, paſtures, feedings, commons, woods, underwoods, ways, waters, water-courſes, fiſhings, privileges, profits, eaſements, commodities, advantages, emoluments, hereditaments, and appurtenances whatſoever to the ſaid capital meſſuage and farm belonging or appertaining, or with the ſame uſed or enjoyed,

Recital. Conſideration.

Releaſe.

Parcels.

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enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the ſame or any part thereof; (all which ſaid premiſes are now in the actual poſſeſſion of the ſaid David Edwards and Francis Golding, by virtue of a bargain and ſale to them thereof made by the ſaid Abraham Barker and Cecilia his wife for one whole year, in conſideration of five ſhillings to them paid by the ſaid David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the ſtatute for transferring uſes into poſſeſſion;) and the reverſion and reverſions, remainder and remainders, yearly and other rents, iſſues, and profits thereof, and every part and parcel thereof, and alſo all the eſtate, right, title, intereſt, truſt, property, claim, and demand whatſoever, both at law and in equity, of them the ſaid Abraham Barker and Cecilia his wife, in, to, or out of, the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes: TO HAVE AND TO HOLD the ſaid capital meſſuage, lands, tenements, hereditaments, and all and ſingular other the premiſes herein before mentioned to be hereby granted and releaſed, with their and every of their appurtenances, unto the ſaid David Edwards and Francis Golding, their heirs and aſſigns, to ſuch uſes, upon ſuch truſts, and to and for ſuch intents and purpoſes as are herein after mentioned, expreſſed, and declared, of and concerning the ſame: that is to ſay, to the uſe and behoof of the ſaid Abraham Barker, and Cecilia his wife, according to their ſeveral and reſpective eſtates and intereſts therein, at the time of, or immediately before the execution of theſe preſents, until the ſolemnization of the ſaid intended marriage: and from and after the ſolemnization thereof to the uſe and behoof of the ſaid John Barker, for and during the term of his natural life; without impeachment of or for any manner of waſte, and from and after the determination of that eſtate, then to the uſe of the ſaid David Edwards and Francis Golding, and their heirs, during the life of the ſaid John Barker, upon truſt to ſupport and preſerve the contingent uſes and eſtates herein after limited from being defeated and deſtroyed, and for that purpoſe to make entries, or bring actions, as the caſe ſhall reqnire; but nevertheleſs to permit and ſuffer the ſaid John Barker, and his aſſigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own uſe and benefit: and from and after the deceaſe of the ſaid John Barker, then to the uſe and behoof of the ſaid Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar and ſatisfaction of her dower and thirds, at common law, which ſhe can or may have or claim, of, in, to, or out of, all, and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the ſaid John Barker now is, or at any time or times hereafter during the coverture between them ſhall be, ſe ſed of any eſtate

Mention of bargain and ſale.

Habendum.

To the uſe of the grantors till marriage:

Then of the huſband for life, *ſans waſte*:

Remainder to truſtees to preſerve contingent remainders:

Remainder to the wife for life, for her jointure, in bar of dower.

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of freehold or inheritance: and from and after the deceaſe of the ſaid Katherine Edwards, or other ſooner determination of the ſaid eſtate, then to the uſe and behoof of the ſaid Charles Browne and Richard More, their executors, adminiſtrators, and aſſigns, for and during, and unto the full end and term of, five hundred years from thence next enſuing and fully to be complete and ended, without impeachment of waſte: upon ſuch truſts nevertheleſs, and to and for ſuch intents and purpoſes, and under and ſubject to ſuch proviſoes and agreements, as are herein after mentioned, expreſſed, and declared of and concerning the ſame: and from and after the end, expiration, or other ſooner determination of the ſaid term of five hundred years, and ſubject thereunto, to the uſe and behoof of the firſt ſon of the ſaid John Barker on the body of the ſaid Katherine Edwards his intended wife to be begotten, and of the heirs of the body of ſuch firſt ſon lawfully iſſuing; and for default of ſuch iſſue, then to the uſe and behoof of the ſecond, third, fourth, fifth, ſixth, ſeventh, eighth, ninth, tenth, and of all and every other the ſon and ſons of the ſaid John Barker on the body of the ſaid Katherine Edwards his intended wife to be begotten, ſeverally, ſucceſſively, and in remainder, one after another, as they and every of them ſhall be in ſeniority of age and priority of birth, and of the ſeveral and reſpective heirs of the body and bodies of all and every ſuch ſon and ſons lawfully iſſuing; the elder of ſuch ſons, and the heirs of his body iſſuing, being always to be preferred and to take before the younger of ſuch ſons, and the heirs of his or their body or bodies iſſuing: and for default of ſuch iſſue, then to the uſe and behoof of all and every the daughter and daughters of the ſaid John Barker on the body of the ſaid Katherine Edwards his intended wife to be begotten, to be equally divided between them, (if more than one,) ſhare and ſhare alike, as tenants in common and not as jointenants, and of the ſeveral and reſpective heirs of the body and bodies of all and every ſuch daughter and daughters lawfully iſſuing: and for default of ſuch iſſue, then to the uſe and behoof of the heirs of the body of him the ſaid John Barker lawfully iſſuing: and for default of ſuch heirs, then to the uſe and behoof of the ſaid Cecilia, the wife of the ſaid Abraham Barker, and of her heirs and aſſigns for ever. AND as to, for, and concerning the term of five hundred years herein before limited to the ſaid Charles Browne and Richard More, their executors, adminiſtrators and aſſigns, as aforeſaid, it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, that the ſame is ſo limited to them upon the truſts, and to and for the intents and purpoſes, and under and ſubject to the proviſoes and agreements, herein after mentioned, expreſſed, and declared, of and concerning the ſame: that is to ſay, in caſe there ſhall be an eldeſt or only ſon and one more or other child or children of the ſaid

Remainder to other truſtees for a term, upon truſts after mentioned:

Remainder to the firſt and other ſons of the marriage in tail:

Remainder to the danghters,

as tenants in common, in tail:

Remainder to the huſband in tail:

Remainder to the huſband's mother in fee.

The truſt of the term declared.

ſaid John Barker, on the body of the ſaid Katherine, his intended wife to be begotten, then upon truſt that they the ſaid Charles Browne and Richard Moore, their executors, adminiſtrators, and aſſigns, by ſale or mortgage of the ſaid term of five hundred years, or by ſuch other ways and means as they or the ſurvivor of them, or the executors or adminiſtrators of ſuch ſurvivor ſhall think fit, ſhall and do raiſe and levy, or borrow and take up at intereſt, the ſum of four thouſand pounds of lawful money of Great Britain, for the portion or portions of ſuch other child and children (beſides the eldeſt or only ſon) as aforeſaid, to be equally divided between them (if more than one) ſhare and ſhare alike; the portion or portions of ſuch of them as ſhall be a ſon or ſons to be paid at his or their reſpective age or ages of twenty-one years; and the portion or portions of ſuch of them as ſhall be a daughter or daughters to be paid at her or their reſpective age or ages of twenty one years, or day or days of marriage, which ſhall firſt happen. And upon this further truſt, that in the mean time and until the ſame portions ſhall become payable as aforeſaid, the ſaid Charles Browne and Richard More, their executors, adminiſtrators, and aſſigns, ſhall and do, by and out of the rents, iſſues, and profits of the premiſes aforeſaid, raiſe and levy ſuch competent yearly ſum and ſums of money for the maintenance and education of ſuch child or children, as ſhall not exceed in the whole the intereſt of their reſpective portions after the rate of four pounds in the hundred yearly. PROVIDED always, that in caſe any of the ſame children ſhall happen to die before his, her, or their portions ſhall become payable as aforeſaid, then the portion or portions of ſuch of them ſo dying ſhall go and be paid unto and be equally divided among the ſurvivor or ſurvivors of them, when and at ſuch time as the original portion or portions of ſuch ſurviving child or children ſhall become payable as aforeſaid. PROVIDED alſo, that in caſe there ſhall be no ſuch child or children of the ſaid John Barker on the body of the ſaid Katherine his intended wife begotten, beſides an eldeſt or only ſon; or in caſe all and every ſuch child or children ſhall happen to die before all or any of their ſaid portions ſhall become due and payable as aforeſaid; or in caſe the ſaid portions, and alſo ſuch maintenance as aforeſaid, ſhall by the ſaid Charles Browne and Richard More their executors, adminiſtrators, or aſſigns, be raiſed and levied by any of the ways and means in that behalf aforementioned; or in caſe the ſame by ſuch perſon or perſons as ſhall for the time being be next in reverſion or remainder of the ſame premiſes expectant upon the ſaid term of five hundred years, ſhall be paid, or well and duly ſecured to be paid, according to the true intent and meaning of theſe preſents; then and in any of the ſaid caſes, and at all times thenceforth, the ſaid term of five hundred years, or ſo much thereof as ſhall remain unſold, or undiſpoſed of for the purpoſes aforeſaid, ſhall

to raiſe portions for younger children.

payable at certain times,

with maintenance at the rate of 4 *per cent.*

and benefit of ſurvivorſhip.

If no ſuch child,

or if all die,

or if the portions be raiſed,

or paid,

or ſecured by the perſon next in remainder; the reſidue of the term to ceaſe.

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Condition, that the uſes and eſtates hereby granted ſhall be void, on ſettling other lands of equal value in recompenſe.

ſhall ceaſe, determine, and be utterly void to all intents and purpoſes, any thing herein contained to the contrary thereof in any wiſe notwithſtanding. PROVIDED alſo, and it is hereby further declared and agreed by and between all the ſaid parties to theſe preſents, that in caſe the ſaid Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the ſurveyor of them, with the approbation of the ſaid David Edwards and Francis Golding, or the ſurvivor of them, or the executors and adminiſtrators of ſuch ſurvivor, ſhall ſettle, convey, and aſſure other lands and tenements of an eſtate of inheritance in fee ſimple, in poſſeſſion, in ſome convenient place or places within the realm of England, of equal or better value than the ſaid capital meſſuage, lands, tenements, hereditaments and premiſes, hereby granted and releaſed, and in lieu, and recompenſe thereof, unto and for ſuch and the like uſes, intents, and purpoſes, and upon ſuch and the like truſts, as the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes are hereby ſettled and aſſured unto and upon, then and in ſuch caſe, and at all times from thenceforth, all and every the uſe and uſes, truſt and truſts, eſtate and eſtates herein before limited, expreſſed, and declared of or concerning the ſame, ſhall ceaſe, determine, and be utterly void to all intents and purpoſes; and the ſame capital meſſuage, lands, tenements, hereditaments, and premiſes, ſhall from thenceforth remain and be to and for the only proper uſe and behoof of the ſaid Abraham Barker or Cecilia his wife, or the ſurvivor of them, ſo ſettling, conveying, and aſſuring ſuch other lands and tenements as aforeſaid, and of his or her heirs and aſſigns for ever: and to and for no other uſe, intent, or purpoſe whatſoever; any thing herein contained to the contrary thereof in any wiſe notwithſtanding.

Covenant to levy a fine.

AND, for the conſiderations aforeſaid, and for barring all eſtates tail, and all remainders or reverſions thereupon expectant and depending, if any be now ſubſiſting and unbarred or otherwiſe undetermined, of any in the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, hereby granted and releaſed, or mentioned to be hereby granted and releaſed, or any of them, or any part thereof, the ſaid Abraham Barker for himſelf and the ſaid Cecilia his wife, his and her heirs, executors, and adminiſtrators, and the ſaid John Barker for himſelf, his heirs, executors, and adminiſtrators, do, and each of them doth, reſpectively covenant, promiſe, and grant, to and with the ſaid David Edwards and Francis Golding, their heirs, executors, and adminiſtrators, by theſe preſents, that they the ſaid Abraham Barker and Cecilia his wife, and John Barker, ſhall and will, at the coſts and charges of the ſaid Abraham Barker, before the end of Michaelmas term next enſuing the date hereof, acknowledge, and levy, before his Majeſty's juſtices of the court of common pleas at Weſtminſter, one or more fine or fines, *ſur cognizance de droit, come ceo,* &c. with proclamations according

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according to the form of the ſtatutes in that caſe made and provided, and the uſual courſe of fines in ſuch caſes accuſtomed, unto the ſaid David Edwards, and his heirs, of the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, by ſuch apt and convenient names, quantities, qualities, number of acres, and other deſcriptions to aſcertain the ſame, as ſhall be thought meet: which ſaid fine or fines, ſo as aforeſaid or in any other manner levied and acknowledged, or to be levied and acknowledged, ſhall be and enure, and ſhall be adjudged, deemed, conſtrued, and taken, and ſo are and were meant and intended, to be and enure, and are hereby declared by all the ſaid parties to theſe preſents to be and enure, to the uſe and behoof of the ſaid David Edwards, and his heirs and aſſigns; to the intent and purpoſe that the ſaid David Edwards may, by virtue of the ſaid fine or fines ſo covenanted and agreed to be levied as aforeſaid, be and become perfect tenant of the freehold of the ſaid capital meſſuage, lands, tenements, hereditaments, and all other the premiſes, to the end that one or more good and perfect common recovery or recoveries may be thereof had and ſuffered, in ſuch manner as is herein after for that purpoſe mentioned. And it is hereby declared and agreed by and between all the ſaid parties to theſe preſents, that it ſhall and may be lawful to and for the ſaid Francis Golding, at the coſts and charges of the ſaid Abraham Barker, before the end of Michaelmas term next enſuing the date hereof, to ſue forth and proſecute out of his majeſty's high court of chancery one or more writ or writs of entry *ſur diſſeiſin en le poſt*, returnable before his majeſty's juſtices of the court of common pleas at Weſtminſter, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other deſcriptions, the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, againſt the ſaid David Edwards; to which ſaid writ, or writs, of entry he the ſaid David Edwards ſhall appear *gratis*, either in his own proper perſon, or by his attorney thereto lawfully authorized, and vouch over to warranty the ſaid Abraham Barker, and Cecilia his wife, and John Barker; who ſhall alſo *gratis* appear in their proper perſons, or by their attorney, or attorneys, thereto lawfully authoriſed, and enter into the warranty, and vouch over to warranty the common vouchee of the ſame court; who ſhall alſo appear, and after imparlance ſhall make default; ſo as judgment ſhall and may be thereupon had and given for the ſaid Francis Golding, to recover the ſaid capital meſſuages, lands, tenements, hereditaments, and premiſes, againſt the ſaid David Edwards, and for him to recover in value againſt the ſaid Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value againſt the ſaid common vouchee, and that execution ſhall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and requiſite for the

in order to make a tenant to the *praecipe*, that a recovery may be ſuffered;

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the ſuffering and perfecting of ſuch common recovery or recoveries, with vouchers as aforeſaid. And it is hereby further declared and agreed by and between all the ſaid parties to theſe preſents, that immediately from and after the ſuffering and perfecting of the ſaid recovery or recoveries, ſo as aforeſaid, or in any other manner, or at any other time or times, ſuffered or to be ſuffered, as well theſe preſents and the aſſurance hereby made, and the ſaid fine or fines ſo covenanted to be levied as aforeſaid, as alſo the ſaid recovery or recoveries, and alſo all and every other fine or fines, recovery and recoveries, conveyances, and aſſurances in the law whatſoever heretofore had, made, levied, ſuffered, or executed, or hereafter to be had, made, levied, ſuffered, or executed, of the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, or any of them, or any part thereof, by and between the ſaid parties to theſe preſents or any of them, or whereunto they or any of them are or ſhall be parties or privies, ſhall be and enure, and ſhall be adjudged, deemed, conſtrued, and taken; and ſo are and were meant and intended, to be and enure, and the recoveror or recoverors in the ſaid recovery or recoveries named or to be named, and his or their heirs, ſhall ſtand and be ſeized of the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, and of every part and parcel thereof, to the uſes, upon the truſts, and to and for the intents and purpoſes, and under and ſubject to the proviſoes, limitations and agreements, herein before mentioned, expreſſed, and declared, of and concerning the ſame. AND the ſaid Abraham Barker, party hereunto, doth hereby for himſelf, his heirs, executors, and adminiſtrators, further covenant, promiſe, grant, and agree, to and with the ſaid David Edwards and Francis Golding, their heirs, executors, and adminiſtrators, in manner and form following; that is to ſay, that the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, ſhall and may at all times hereafter remain, continue, and be, to and for the uſes and purpoſes, upon the truſts, and under and ſubject to the proviſoes, limitations, and agreements, herein before-mentioned, expreſſed, and declared, of and concerning the ſame, and ſhall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the ſaid Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or aſſigns, or of or by any other perſon or perſons lawfully claiming or to claim from, by, or under, or in truſt for him, her, them, or any of them; and ſhall ſo remain, continue, and be, free and clear, and freely and clearly acquitted, exonerated, and diſcharged, or otherwiſe by the ſaid Abraham Barker, or Cecilia his wife, parties hereunto, his or her heirs, executors, or adminiſtrators, well and ſufficiently ſaved, defended, kept harmleſs, and indemnified

to enure

to the preceding uſes in this deed.

Other covenants;

for quiet enjoyment,

free from incumbrances;

demnified of, from, and againſt all former and other gifts, grants, bargains, ſales, leaſes, mortgages, eſtates, titles, troubles, charges, and incumbrances whatſoever, had, made, done, committed, occaſioned, or ſuffered, or to be had, made, done, committed, occaſioned, or ſuffered, by the ſaid Abraham Barker, or Cecilia his wife, or by his and her anceſtors, or any of them, or by his, her, their, or any of their act, means, aſſent, conſent, or procurement: AND MOREOVER that he the ſaid Abraham Barker, and Cecilia his wife, parties hereunto, and his and her heirs, and all other perſons having or lawfully claiming, or which ſhall or may have or lawfully claim, any eſtate, right, title, truſt, or intereſt, at law or in equity, of, in, to, or out of, the ſaid capital meſſuage, lands, tenements, hereditaments, and premiſes, or any of them, or any part thereof, by or under or in truſt for him, her, them, or any of them, or by or under his or her anceſtors or any of them, ſhall and will from time to time, and at all times hereafter, upon every reaſonable requeſt, and at the coſt and charges, of the ſaid David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or adminiſtrators, make, do, and execute, or cauſe to be made, done, and executed, all ſuch further and other lawful and reaſonable acts, deeds, conveyances, and aſſurances in the law whatſoever, for the further, better, more perfect, and abſolute granting, conveying, ſettling, and aſſuring of the ſame capital meſſuage, lands, tenements, hereditaments, and premiſes, to and for the uſes and purpoſes, upon the truſts, and under and ſubject to the proviſoes, limitations and agreements, herein before mentioned, expreſſed, and declared, of and concerning the ſame, as by the ſaid David Edwards and Francis Golding or either of them, their or either of their heirs, executors, or adminiſtrators, or their or any of their counſel learned in the law ſhall be reaſonably adviſed, deviſed, or required: ſo as ſuch further aſſurances contain in them no further or other warranty or covenants than againſt the perſon or perſons, his, her, or their heirs, who ſhall make or do the ſame; and ſo as the party or parties, who ſhall be requeſted to make ſuch further aſſurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then reſpective dwellings, or places of abode. PROVIDED LASTLY, and it is hereby further declared and agreed by and between all the parties to theſe preſents, that it ſhall and may be lawful to and for the ſaid Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their reſpective hands and ſeals, and atteſted by two or more credible witneſſes, to revoke, make void, alter or change all and every or any the uſe and uſes, eſtate and eſtates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital

and for further aſſurance.

Power of revocation.

N°. II.

Concluſion.

capital meſſuage, lands, tenements, hereditaments, and premiſes aforeſaid, or of and in any part or parcel thereof, and to declare new and other uſes of the ſame, or of any part or parcel thereof, any thing herein contained to the contrary thereof in any wiſe notwithſtanding. IN WITNESS WHEREOF the parties to theſe preſents their hands and ſeals have ſubſcribed and ſet, the day and year firſt above written.

Sealed, and delivered, being firſt duly ſtamped, in the preſence of
George Carter.
William Brown.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)
Charles Browne. (L. S.)
Richard More. (L. S.)
John Barker. (L. S.)
Katherine Edwards. (L. S.)

N°. III.

N°. III.

An OBLIGATION, *or* BOND, *with* CONDITION *for the Payment of Money.*

KNOW ALL MEN by theſe preſents, that I David Edwards, of Lincoln's Inn in the county of Middleſex, eſquire, am held and firmly bound to Abraham Barker of Dale-Hall in the county of Norfolk, eſquire, in ten thouſand pounds of lawful money of Great Britain, to be paid to the ſaid Abraham Barker, or his certain attorney, executors, adminiſtrators, or aſſigns; for which payment well and truly to be made, I bind myſelf, my heirs, executors, and adminiſtrators, firmly by theſe preſents, ſealed with my ſeal. Dated the fourth day of September in the twenty firſt year of the reign of our ſovereign lord GEORGE the ſecond by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and ſo forth, and in the year of our Lord one thouſand, ſeven hundred, and forty-ſeven.

THE CONDITION of this obligation is ſuch, that if the above bounden David Edwards, his heirs, executors, or adminiſtrators, do and ſhall well and truly pay, or cauſe to be paid, unto the above named Abraham Barker, his executors, adminiſtrators, or aſſigns, the full ſum of five thouſand pounds, of lawful Britiſh money, with lawful intereſt for the ſame, on the fourth day of March next enſuing the date of the above written obligation, then this obligation ſhall be void and of none effect, or elſe ſhall be and remain in full force and virtue.

Sealed, and delivered, being firſt duly ſtamped, in the preſence of
George Carter.
William Browne.

David Edwards. (L. S.)

N°. IV.

N°. IV.

N°. IV.

A FINE *of Lands*, ſur Cognizance de droit, come ceo, *&c.*

§. 1. *Writ of Covenant*; *or* PRAECIPE.

GEORGE the ſecond by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth; to the ſheriff of Norfolk, greeting. COMMAND Abraham Barker, eſquire, and Cecilia his wife, and John Barker, eſquire, that juſtly and without delay they perform to David Edwards, eſquire, the covenant made between them of two meſſuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of paſture, and fifty acres of wood, with the appurtenances, in Dale; and unleſs they ſhall ſo do, and if the ſaid David ſhall give you ſecurity of proſecuting his claim, then ſummon by good ſummoners the ſaid Abraham, Cecilia, and John, that they appear before our juſtices, at Weſtminſter, from the day of ſaint Michael in one month, to ſhew wherefore they have not done it: and have you there the ſummoners, and this writ. WITNESS ourſelf at Weſtminſter, the ninth day of October, in the twenty firſt year of our reign.

Sheriff's return. Pledges of proſecution, { John Doe, Richard Roe. } Summoners of the within named Abraham, Cecilia, and John. { John Den. Richard Fen: }

§. 2. *The Licence to agree.*

Norfolk, to wit. } DAVID EDWARDS, eſquire, gives to the lord the king ten marks, for licence to agree with Abraham Barker, eſquire, of a plea of covenant of two meſſuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of paſture, and fifty acres of wood, with the appurtenances, in Dale.

§. 3. *The Concord.*

AND THE AGREEMENT IS SUCH, to wit, that the aforeſaid Abraham, Cecilia, and John, have acknowledged the aforeſaid

aforeſaid tenements, with the appurtenances, to be the right of him the ſaid David, as thoſe which the ſaid David hath of the gift of the aforeſaid Abraham, Cecilia, and John; and thoſe they have remiſed and quitted claim, from them and their heirs, to the aforeſaid David and his heirs for ever. And further, the ſame Abraham, Cecilia, and John, have granted for themſelves and their heirs, that they will warrant to the aforeſaid David, and his heirs, the aforeſaid tenements, with the appurtenances, againſt all men for ever. And for this recognition, remiſe, quit-claim, warranty, fine, and agreement, the ſaid David hath given to the ſaid Abraham, Cecilia, and John, two hundred pounds ſterling.

§. 4. *The Note, or Abſtract.*

Norfolk, } BETWEEN David Edwards, eſquire, complain-
to wit. } ant, and Abraham Barker, eſquire, and Cecilia his wife, and John Barker, eſquire, deforciants, of two meſſuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of paſture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was ſummoned between them; to wit, that the ſaid Abraham, Cecilia, and John, have acknowleged the aforeſaid tenements, with the appurtenances, to be the right of him the ſaid David, as thoſe which the ſaid David hath of the gift of the aforeſaid Abraham, Cecilia, and John; and thoſe they have remiſed and quitted claim, from them and their heirs, to the aforeſaid David and his heirs for ever. And further, the ſame Abraham, Cecilia, and John, have granted for themſelves, and their heirs, that they will warrant to the aforeſaid David, and his heirs, the aforeſaid tenements, with the appurtenances, againſt all men for ever. And for this recognition, remiſe, quit-claim, warranty, fine, and agreement, the ſaid David hath given to the ſaid Abraham, Cecilia, and John, two hundred pounds.

§. 5. *The Foot, Chirograph, or Indentures, of the* FINE.

Norfolk, } THIS IS THE FINAL AGREEMENT, made
to wit. } in the court of the lord the king at Weſtminſter, from the day of Saint Michael in one month, in the twenty firſt year of the reign of the lord GEORGE the ſecond by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and ſo forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, juſtices, and other faithful ſubjects of the lord the king then there preſent, between David Edwards, eſquire, complainant, and Abraham Barker, eſquire,

N°. IV. eſquire, and Cecilia his wife, and John Barker, eſquire, deforciants, of two meſſuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of paſture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was ſummoned between them in the ſame court; to wit, that the aforeſaid Abraham, Cecilia, and John, have acknowledged the aforeſaid tenements, with the appurtenances, to be the right of him the ſaid David, as thoſe which the ſaid David hath of the gift of the aforeſaid Abraham, Cecilia, and John; and thoſe they have remiſed and quitted claim, from them and their heirs, to the aforeſaid David and his heirs for ever. And further, the ſame Abraham, Cecilia, and John, have granted for themſelves and their heirs, that they will warrant to the aforeſaid David and his heirs, the aforeſaid tenements, with the appurtenances, againſt all men for ever. And for this recognition, remiſe, quit-claim, warranty, fine, and agreement, the ſaid David hath given to the ſaid Abraham, Cecilia, and John, two hundred pounds ſterling.

§. 6. *Proclamations, endorſed upon the* FINE, *according to the Statutes.*

THE FIRST proclamation was made the ſixteenth day of November, in the term of ſaint Michael, in the twenty firſt year of the king within written.

THE SECOND proclamation was made the fourth day of February, in the term of ſaint Hilary, in the twenty firſt year of the king within written.

THE THIRD proclamation was made the thirteenth day of May, in the term of Eaſter, in the twenty firſt year of the king within written.

THE FOURTH proclamation was made the twenty eighth day of June, in the term of the holy Trinity, in the twenty ſecond year of the king within written.

N°. I.

N°. V.

A Common RECOVERY *of Lands, with * double Voucher.*

§. 1. *Writ of Entry* ſur Diſſeiſin *in the* Poſt; *or,* PRAECIPE.

GEORGE the ſecond by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and ſo forth; to the ſheriff of Norfolk, greeting. COMMAND David Edwards, eſquire, that juſtly and without delay he render to Francis Golding, clerk, two meſſuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of paſture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the ſaid David hath not entry, unleſs after the diſſeiſin, which Hugh Hunt thereof unjuſtly, and without judgment, hath made to the aforeſaid Francis, within thirty years now laſt paſt, as he ſaith, and whereupon he complains that the aforeſaid David deforceth him. And unleſs he ſhall ſo do, and if the ſaid Francis ſhall give you ſecurity of proſecuting his claim, then ſummon by good ſummoners the ſaid David, that he appear before our juſtices at Weſtminſter, on the octave of ſaint Martin, to ſhew wherefore he hath not done it: and have you there the ſummoners, and this writ. WITNESS ourſelf at Weſtminſter, the twenty ninth day of October, in the twenty firſt year of our reign.

Pledges of proſecution, { John Doe. Richard Roe. } Summoners of the within-named David, { John Den. Richard Fen. } Sheriff's return.

§. 2. *Exemplification of the* RECOVERY *Roll.*

GEORGE the ſecond by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and ſo forth; to all to whom theſe our preſent letters ſhall come, greeting. KNOW YE, that among the pleas of land, enrolled at Weſtminſter, before Sir John Willes, knight, and his fellows, our juſtices of the bench, of the term of ſaint Michael, in the twenty firſt year of our reign, upon the fifty ſecond roll it is thus contained. ENTRY returnable on the octave of ſaint Return.

* Note, That if the recovery be had with ſingle voucher, the parts marked "thus" in § 2 are omitted.

N°. V.

Demand againſt the tenant.

Martin. NORFOLK, to wit: Francis Golding, clerk, in his proper perſon demandeth againſt David Edwards, eſquire, two meſſuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of paſture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the ſaid David hath not entry, unleſs after the diſſeiſin, which Hugh Hunt thereof unjuſtly, and without judgment, hath made to the aforeſaid Francis, within thirty years now laſt paſt. And whereupon he ſaith, that he himſelf was ſeiſed of the tenements aforeſaid, with the appurtenances, in his demeſne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [* of ſix ſhillings and eight pence, and more, in rents, corn and graſs:] and into which [the ſaid David hath not entry, unleſs as aforeſaid:] and thereupon he bringeth ſuit, [and good proof.] AND the ſaid David in his proper perſon comes and defendeth his right, when [and where it ſhall behove him] and thereupon voucheth to warranty "John Barber, eſquire; who is preſent here in court in his "proper perſon, and the tenements aforeſaid with the appur-"tenances to him freely warranteth, [and prays that the ſaid "Francis may count againſt him.] AND hereupon the ſaid "Francis demandeth againſt the ſaid John, tenant by his own "warranty, the tenements aforeſaid with the appurtenances, in "form, aforeſaid, &c. And whereupon he ſaith, that he him-"ſelf was ſeiſed of the tenements aforeſaid, with the appurte-"nances, in his demeſne as of fee and right, in time of peace, in "the time of the lord the king that now is, by taking the profits "thereof to the value, &c. And into which, &c. And there-"upon he bringeth ſuit, &c. AND the aforeſaid John, te-"nant by his own warranty, defends his right, when, &c. "and thereupon he further voucheth to warranty" Jacob Morland; who is preſent here in court in his proper perſon, and the tenements aforeſaid, with the appurtenances, to him freely warranteth, &c. AND hereupon the ſaid Francis demandeth againſt the ſaid Jacob, tenant by his own warranty, the tenements aforeſaid, with the appurtenances, in form aforeſaid, &c. And whereupon he ſaith, that he himſelf was ſeiſed of the tenements aforeſaid, with the appurtenances, in his demeſne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth ſuit, &c. AND the aforeſaid Jacob, tenant by his own warranty, defends his right, when, &c. And ſaith that the aforeſaid Hugh did not diſſeiſe the aforeſaid Francis of the tenements aforeſaid, as the aforeſaid Francis by his writ and count aforeſaid above

Eſplees.

Defence of the tenant.

Voucher.

" Warranty.

" Demand " againſt the " vouchee.

" Count.

" Defence of " the vouchee.

" Second " vouchee." Warranty.

Demand againſt the common vouchee.

Count.

Defence of the common vouchee.

Plea, *nul diſſeiſin.*

* The clauſes, between hooks, are no otherwiſe expreſſed in the record than by an &c.

doth

N°. V.

doth ſuppoſe: and of this he puts himſelf upon the country. AND the aforeſaid Francis thereupon craveth leave to imparl; and he hath it. Imparlance. And afterwards the aforeſaid Francis cometh again here into court in this ſame term in his proper perſon, and the aforeſaid Jacob, though ſolemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. Default of the common vouchee. THEREFORE IT IS CONSIDERED, that the aforeſaid Francis do recover his ſeiſin againſt the aforeſaid David of the tenements aforeſaid, with the appurtenances; and that the ſaid David have of the land of the aforeſaid "John, to "the value [of the tenements aforeſaid;] and further, that the "ſaid John, have of the land of the ſaid" Jacob to the value [of the tenements aforeſaid.] Judgment for the demandant. Recovery in value. And the ſaid Jacob in mercy. Amercement. AND hereupon the ſaid Francis prays a writ of the lord the king, to be directed to the ſheriff of the county aforeſaid, to cauſe him to have full ſeiſin of the tenements aforeſaid with the appurtenances: and it is granted unto him, returnable here without delay. Award of the writ of ſeiſin, and return. Afterwards, that is to ſay, the twenty eighth day of November in this ſame term, here cometh the ſaid Francis in his proper perſon; and the ſheriff, namely ſir Charles Thompſon, knight, now ſendeth, that he by virtue of the writ aforeſaid to him directed, on the twenty fourth day of the ſame month, did cauſe the ſaid Francis to have full ſeiſin of the tenements aforeſaid with the appurtenances, as he was commanded. ALL AND SINGULAR which premiſes, at the requeſt of the ſaid Francis, by the tenor of theſe preſents we have held good to be exemplified. Exemplification continued. In teſtimony whereof we have cauſed our ſeal, appointed for ſealing writs in the bench aforeſaid, to be affixed to theſe preſents. WITNESS Sir John Willes, knight, at Weſtminſter, the twenty eighth day of November, in the twenty firſt year of our reign. *Teſte.*

Cooke.

THE END.


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MAY
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